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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALTAMONT FARMS, INC., *et al.*,
Petitioners,

v.

NELLY RIOS, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

S. STEVEN KARALEKAS
CHARLES, KARALEKAS, MCCAHILL
& WILSON
1250 Connecticut Avenue, N.W.
Suite 318
Washington, D.C. 20036
(202) 466-7330
Attorney for Petitioners

Of Counsel:
CHARLES, KARALEKAS, MCCAHILL
& WILSON
THOMAS E. WILSON

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the mere sending of an employer's job clearance order by the Department of Labor to a particular state through the national job clearance system created by the Wagner-Peyser Act confers upon the courts of that state *in personam* jurisdiction over the employer whose job clearance order is thus circulated.

2. Whether the conference of *in personam* jurisdiction upon the courts of states designated each year by the Department of Labor to receive employer job clearance orders over the employers who submitted those job clearance orders only to employment service offices in their home states offends the due process rights guaranteed by the U.S. Constitution.

3. Whether the conference of *in personam* jurisdiction upon the courts of states designated each year by the Department of Labor to receive job clearance orders over the employers who submitted those job clearance orders only to employment service offices in their home states is contrary to the congressional employment development policies mandated by the Wagner-Peyser Act.

PARTIES TO THE PROCEEDING BELOW

The respondents before this Court, who were plaintiffs before the New York Supreme Court, Trial Division, and appellants before the New York Court of Appeals, are the following individuals:

Nelly Rios (individually and as the legal representative of her son, Juan Valderrama Rios)
Pablo Cepeda Quinones
Juan Nunez Quino
Robert Santiago Gomez
Federico Albert Colon
Felix Davila Fuentes
Ricardo Navarro Rivero
Silva Esther Resto Jaime (individually and as the legal representative of her son, Angel Luis Garcia Resto)
Daniel Figuero Ramos (individually and on behalf of his son, Jose Daniel Figueroa Sandoval)
Montserrate Rivera (individually and as the legal representative of his son, Edwin Amezquita Rivera)
Justo M. Velez (individually and as the legal representative of his son, Gilberto Medina Miranda)
Jesusa Vasquez (individually and as the legal representative of her son, Armando Robles Vasquez)
Ramon Luis Escabi Delgado (by his father Ramon Luis Escabi Ortiz)
Emilio Santos Rivera
Luis Torrez Lopez
Rafael Hernaiz Ramos
David Casado Sanchez
Orlando Rivera Paz (by his mother Nilsa Paz de Rivera)
Hector Manuel Rodriguez
Julio Jiminez Romero (by his mother Donato Romero)
Celestino Amaro (individually and on behalf of his son Domingo Amaro Figueroa)

Catalina Malave
Raul Delgado Montes
Esteban Acosta Rosa
Martin Bracetty Baez
Jorge Cuadra Rosado
Rafael Melendez Ortero
Luis A. Moyet
Jose Rosa Rios
Justo Sanchez Martinez
Jesus Carrasquillo Delgado
Alejo Morales Torres
Angel Medina Ramos

The petitioners before this Court, who were defendants before the New York Supreme Court, Trial Division, and appellees before the New York Court of Appeals, are the following apple growers located in the Hudson Valley of the State of New York:

Altamont Farms, Inc.
Ernest Greiner
Overlook Farms, Inc.
Minard Farm, Inc.
A. J. Dembroski
Robert Coy
J. W. Clark & Sons

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DECISIONS BELOW

On March 1, 1983, the Supreme Court for the State of New York, Ulster County, held for the worker-respondents by granting full faith and credit to the decisions of Puerto Rican courts against the grower-petitioners. The opinion, which is not reported, appears at Appendix C hereof. The growers appealed.

On May 2, 1984, the Appellate Division of the Supreme Court of New York held for the growers by reversing the decision of the Trial Division, one judge dissenting. The Opinion and Order of the Appellate Division appear at Appendix B hereof. The workers appealed.

On February 5, 1985, the Court of Appeals for the State of New York held for the workers by reversing the decision of the Appellate Division. The Court did not

issue an opinion, but instead adopted the rationale embodied in the dissenting opinion of the Appellate Division. The Order of the Court of Appeals for the State of New York appears at Appendix A hereof.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The Court of Appeals for the State of New York entered its judgment on February 5, 1985.

STATUTES AND REGULATIONS INVOLVED

The statutes involved in this case are (i) Rule 4.7 of the Rules of Civil Procedure of the Commonwealth of Puerto Rico, 32 L.P.R.A. App. II, Rule 4.7(a); (ii) the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.;* and (iii) the Wagner-Peyser Act, 29 U.S.C. §§ 49-49K. The administrative regulations involved are (i) the Immigration and Naturalization Service Regulation, 8 C.F.R. § 214.2 (1978); (ii) the Temorary Foreign Labor Certification Process Regulations, 20 C.F.R. §§ 655.200 *et seq.* (1978); and (iii) the Wagner-Peyser Act Employment Service Regulations, 20 C.F.R. §§ 653.500 *et seq.* (1978). The pertinent provisions of these statutes and regulations appear at Appendix F hereof.

The Constitutional provisions involved are: (i) U.S. Const. amend. V; and (ii) U.S. Const. amend XIV, § 1. Those provisions appear at Appendix F hereof.

STATEMENT OF THE CASE

Petitioners are small family-owned apple orchards located in New York's Hudson Valley (the "grower-petitioners"). Respondents are Puerto Rican workers who were employed by the grower-petitioners during the 1978 harvest season and mothers of such workers claiming that they suffered mental anguish as a result of their sons' employment (the "worker-respondents").

Apples are an extremely perishable fruit. They must be harvested within only a few days of becoming ripe or they lose most of their economic value. Apples are also harvested only once a year, generally in the fall. If, for any reason, an apple grower fails to harvest his crop when it is ready, he faces financial ruin. For many years, there has existed an inadequate supply of domestic farm labor to harvest apples.[1] As a consequence, in order to assure the timely harvesting of their crops, apple growers have had to import labor from abroad to supplement the domestic labor supply.

The Immigration and Nationality Act ("INA") and its implementing regulations authorize agricultural employers to apply to the Immigration and Naturalization Service ("INS") for certification to admit into this country and to employ temporary foreign workers when the domestic labor supply is inadequate. 8 U.S.C. §§ 1101 (a)(15)(H)(ii) and 1184(c); 8 C.F.R. § 214.2(h)(3) (1984). This program is known as the "H-2 program." The temporary workers brought in under it are called "H-2 workers."

Employer applications to INS for H-2 workers must be accompanied by a certificate from the U.S. Department of Labor ("DOL") that qualified U.S. workers are not available and that the employment of temporary foreign workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. 8 C.F.R. § 214.2(h)(3) (1984). In order to determine the availability of U.S. workers prior to making any certification to INS, DOL first requires employers to attempt to recruit U.S. workers by using the employ-

[1] The dearth of domestic harvest labor is not limited to apple farming, but affects agriculture generally. Agricultural Labor Certification Programs and Small Business: *Hearings Before the Select Committee on Small Business, U.S. Senate*, 95th Cong., 1st Sess. (1977) (Statement of Sen. Robert Packwood); *see also* S. Rep. No. 1515, 81st Cong., 2d Sess. 578 (1950).

ment service system created by the Wagner-Peyser Act. 29 U.S.C. §§ 49-49K.

The Wagner-Peyser Act was enacted in 1933. It established a national system of public employment offices designed to provide a no-fee labor exchange for both employers and job seekers. *See* 20 C.F.R. § 653.501(a) (1984). The national employment service system thus created a means of coordinating the activities of the various state and Federal public employment service offices in aid of the important public policy objectives of reducing unemployment throughout the nation and stabilizing labor conditions among the states, Puerto Rico, Guam and the U.S. Virgin Islands. H. Rep. No. 158, 73d Cong., 1st Sess. 2 (1933).

The overwhelming majority of employers who utilize the employment service system as a means of finding workers to fill their jobs have no need ultimately to import temporary workers from abroad. The process leading to the recruitment of domestic workers for employers who have no anticipation of needing temporary foreign workers and for employers who do anticipate such a need is identical. *See* 20 C.F.R. § 653.500 *et seq.* (1984) (domestic workers recruitment only); 20 C.F.R. § 655.200 *et seq.* (1984) (domestic and temporary foreign workers).

An employer seeking to recruit domestic workers through the employment service system submits to its local employment office a job clearance order. An employer ultimately seeking temporary foreign workers submits to its local employment office the very same job clearance order. In addition, the prospective H-2 employer files with the employment office an application for DOL certification to admit and employ temporary foreign workers. As a consequence, the issues involved in this litigation are not confined to employers of H-2 workers—they affect the employment service system *gen-*

erally and *all* employers who seek to use that system as a means of recruiting domestic labor.

Employer job clearance orders set out in detail the terms and conditions of the jobs being offered. 20 C.F.R. § 655.201(b)(1) (1984). The job clearance order is a formal government document, which gives notice of the job opportunity which it describes. The clearance orders in these cases detailed the procedures which workers were to follow in order to present themselves to the orchards for an interview, either in person or by telephone. Under the explicit terms of the job orders, the *employer* first needed to accept the worker's offer to work before the worker could be hired. The job clearance order is *not* an offer of employment. Rather, it is a notification to workers that jobs exist for which, if qualified, they might be hired.[2]

Upon receipt of an employer's job clearance order, the local employment service office attempts first to recruit workers for the job described in the clearance order in the local job market. 20 C.F.R. § 653.501(d)(7) (1984). If sufficient workers are not available locally, the job

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[2] Under DOL's regulations, employers are not required to hire every worker, but only those qualified workers who apply for employment. 20 C.F.R. § 655.203(e) (1984). The regulations also state that a job clearance order does not "constitute a contractual job offer to which the [Employment and Training Administration] or a state agency is in any way a party." 20 C.F.R. § 653.108(b)(1) (1984). Finally, to label an employer's job clearance order as a binding offer of employment, capable of immediate, unilateral, and silent acceptance, would destroy completely any chance of an orderly recruitment system. Under that construction, *any* worker, *anywhere* in the country, could form a binding contract with an employer simply by reading the job clearance order and deciding to "accept" the job described. The employer, in turn, would have no way of knowing how many such workers had "accepted" his clearance order "offer" until they all arrived at the place of employment. Moreover, the employer would have no way of screening out workers who in fact are not qualified for the employment in question.

clearance order is placed in the intrastate clearance system for circulation to employment service offices statewide. *Id.* at § 653.501(d)(3). Should state-wide recruitment prove unsuccessful, the state agency then sends the job clearance order to DOL for placement into the interstate clearance system. *Id.* at § 653.501(e)(2).

DOL's Regional Administrator for an employer's area has the exclusive responsibility of determining the states which are to receive job clearance orders for particular jobs. 20 C.F.R. §§ 653.501(e)(3) and 655.205(a) (1984). Such decision is made anew each year and is dependent upon the circumstances present in the labor marketplace. In one year a job clearance order might be circulated from Maine to Hawaii, Colorado and Texas. In another year, that same job clearance order might go to California, Texas and Florida. Central to understanding the importance of this case is this: In a given year, when an employer, say, in Kennebunkport, Maine, files his job clearance order with his local state employment office, he has no way of knowing to which states that order might ultimately be transmitted. The employer cannot designate to which states the order is to be sent; neither may he interfere with the decisions of DOL's Regional Administrator to circulate the order to particular areas.

If at any stage in the recruitment process, local, intrastate, or interstate recruitment produces workers sufficient in number to meet an employer's labor needs, the recruitment process stops. Should local or state-wide recruitment produce an adequate labor force, the employer's job clearance order will not be circulated to DOL for nationwide recruitment.

In the present case, the grower-petitioners submitted their job clearance orders to their local employment service office in Kingston, New York. That was done approximately three months before the start of the 1978 apple harvest. As in previous years, local and state-wide re-

cruitment in 1978 produced insufficient numbers of workers to harvest the New York apple growers' crops. The New York State employment service, therefore, sent DOL the growers' clearance orders for circulation to labor surplus states to be chosen by DOL.

In 1978, Puerto Rico, unique among the 50 states and the U.S. territories, had a law which forbade employers directly or indirectly from recruiting workers for mainland employment unless those employers first met a complex array of requirements. This was caused by Puerto Rico's Public Law 87, 29 L.P.R.A. §§ 526 *et seq.*, a law which imposed upon mainland employers of Puerto Rican workers terms and conditions of employment more burdensome than those imposed by the Wagner-Peyser Act and the INA.[3] As a consequence of those added requirements, Puerto Rican workers were not considered to be "available" within the meaning of the INA.

On July 13, 1978, the Puerto Rican legislature amended Public Law 87 to remove the impediments to recruitment by DOL of workers in Puerto Rico through the interstate clearance system. On August 3, 1978—only two weeks before the date of need for workers specified in some of the New York apple growers' job clearance orders—DOL sent representatives to Puerto Rico for the purpose of recruitment of farmworkers for the 1978 apple harvest season.[4] The DOL representatives took

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[3] Importantly, because of Public Law 87, DOL advised the New York growers that their job orders would *not* be sent to Puerto Rico in 1978. In fact, at the time, two Federal court decisions decreed Puerto Rican workers to be unavailable under the INA. *See Flecha v. Quiros*, 567 F.2d 1154 (1st Cir. 1977), *cert. denied*, 436 U.S. 945 (1978), and *Galan v. Dunlop*, 411 F. Supp. 268 (D.D.C. 1975), *appeals dismissed as moot and remanded with order to vacate sub nom. Galan v. Usery*, Nos. 76-1018 and 76-1019 (D.C. Cir. 1977) (unpublished).

[4] Report by the Comptroller General of the United States to Senator Robert C. Byrd, "Recruiting and Placing Puerto Rican Workers with Growers During the 1978 Apple Harvest Were Unsuccessful," HRD-80-45 (GAO, February 14, 1980).

with them to Puerto Rico job clearance orders for growers in Maryland, New York, Virginia, and West Virginia.

DOL conducted worker recruitment in Puerto Rico without contacting the grower-petitioners. The grower-petitioners, therefore, were entirely ignorant of the fact that their job orders had gone to Puerto Rico. The only action taken by the New York growers which ultimately involved the Commonwealth of Puerto Rico in any way was the growers' submission of their job clearance orders to their *local* employment service offices in Kingston, New York. The growers—

- had no offices in Puerto Rico;
- hired no agents in Puerto Rico;
- sent no money to Puerto Rico;
- sent no telegrams to Puerto Rico;
- received no telegrams from Puerto Rico;
- made no telephone calls to Puerto Rico;
- received no telephone calls from Puerto Rico;
- directed no correspondence to Puerto Rico;
- received no correspondence from Puerto Rico;
- did not travel to Puerto Rico;
- made no attempt to contact the Puerto Rican Secretary of Labor;
- received no communication from the Puerto Rican Secretary of Labor; and
- had no control over any of the actions of the Puerto Rican Secretary of Labor or any other official or instrumentality of the Puerto Rican government.

DOL's recruitment trip to Puerto Rico generated a number of workers who ultimately were employed by the

grower-petitioners. The worker-respondents in this case were among those employed. After returning to Puerto Rico from New York, the worker-respondents filed breach of contract suits in Puerto Rican courts against the grower-petitioners. Some of the respondents are not workers—they are the mothers of workers who sued the growers in tort alleging that they had suffered mental anguish as a result of their sons' experiences in 1978.[5]

The growers did not appear in the Puerto Rican courts and default judgments were entered. The respondent-workers then sought to enforce those Puerto Rican judgments in New York. The growers asserted that the Puerto Rican judgments against them were void because the Puerto Rican courts had no personal jurisdiction over them.

The question presented the courts below was whether the submission by a grower of a job clearance order to his local employment service office in Kingston, New York created a sufficient nexus between that grower and all states to which that clearance order ultimately might have been sent by DOL legitimately to confer upon the courts of those states long-arm jurisdiction over the grower-employer.

The grower-petitioners moved for summary judgment at the trial level, raising the objection that the exercise of *in personam* jurisdiction over defendants based on the facts presented violated the due process requirements of the U.S. Constitution. Memorandum of Points and Authorities in Support of Defendant's Motion for Summary

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[5] The Puerto Rico long-arm statute confers long-arm jurisdiction over nonresident defendants who carry out business transactions within Puerto Rico or commit tortious acts within Puerto Rico. 32 L.P.R.A. App. II, Rule 4.7(a). The statute provides that the contract action or tort must take place in Puerto Rico, thereby contemplating some physical presence of the nonresident defendant within the forum. No such physical contact between the grower-petitioners and Puerto Rico occurred in the present case.

Judgment, pp. 11-18 (May 21, 1982). The New York Supreme Court, Ulster County, on March 1, 1983, consolidated the cases and denied the growers' motion for summary judgment, holding for the worker-respondents. The court concluded that "Puerto Rico's assertion of jurisdiction under its statute is not violative of the due process clause of the Fourteenth Amendment to the United States Constitution." *See* App. C at p. 25a.

The growers appealed, arguing that minimum contacts between the growers and Puerto Rico were not presented by the facts of the case and that assertion of *in personam* jurisdiction by the Puerto Rico courts over the growers violated the growers' due process rights. Brief for Appellants, State of New York Supreme Court, Appellate Division, pp. 15-17 (October 3, 1983). The Appellate Division of the New York Supreme Court agreed with the growers; it reversed the Trial Division, with one judge dissenting. The court said:

> Contrary to plaintiffs' assertion, we fail to find that the forwarding of defendants' clearance orders to Puerto Rico by the United States Department of Labor was an activity of defendants by which they purposefully availed themselves of the privilege of conducting activities within Puerto Rico, thus invoking the benefits and protections of Puerto Rican law. . . . In sum, it is this court's opinion that the fortuitous nature of defendants' sole contact with Puerto Rico is insufficient to satisfy the requirements of due process.

See App. B at pp. 11a-12a.

By contrast, the dissenting opinion determined that the grower-petitioners *were* within the reach of the Puerto Rico long-arm statute. The opinion argued erroneously that the employers' job clearance orders constituted contract *offers*, and that contracts were formed between the mainland employers and the Puerto Rico workers upon the acceptance of those offers in Puerto

Rico. The dissent also found that the Puerto Rico Secretary of Labor acted *solely* on behalf of grower-petitioners. This finding ignored the plain fact that had the grower-petitioners wished to designate the Secretary of Labor as their hiring agent, they could have done so. There was a specific DOL procedure which the growers could have followed to make that designation, but the growers declined to do so for Puerto Rico and *all the states*, preferring instead to do their own hiring either in person or by telephone. Further, as found by the majority opinion, the Puerto Rican workers were recruited *without* the growers being contacted.[6] App. B at p. 9a. The dissent concluded that the mere filing of a job clearance order by an employer with his local employment service office was sufficient to subject that employer to the jurisdiction of the courts in any state to which DOL might choose to transmit the job order. App. B at pp. 17a-18a. Under the dissenting opinion's formulation, a formulation ultimately adopted by New York's highest court, the single act of submitting a job clearance order could result in the employer being amenable to suit *anywhere* in the continental United States, Hawaii, Puerto Rico, Guam or the U.S. Virgin Islands.

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[6] It is beyond dispute that the Commonwealth of Puerto Rico, of which the Secretary of Labor is an agent, acted as the agent of the *workers*, not the *growers*. Indeed, in *Alfred L. Snapp & Sons, Inc. v. Puerto Rico, ex rel., Pedro Barez*, 458 U.S. 592 (1982), this Court specifically determined that the Commonwealth of Puerto Rico participated in the job service system on behalf of, and for the benefit of, Puerto Rican *workers*, not Virginia *growers*. Further, Public Law 87 specifically designates the Puerto Rico Secretary of Labor to act on behalf of *workers*. 29 L.P.R.A. §§ 526, 529. It is axiomatic that an agent cannot act as agent for both parties to a transaction where there are conflicting interests between the parties. Since the Secretary of Puerto Rico was in fact acting on behalf of the workers, he could not at the same time have been the agent of the growers thereby conferring jurisdiction over the growers upon Puerto Rican courts.

The worker-respondents appealed from the majority decision of the Appellate Division. On February 5, 1985, the New York Court of Appeals reversed the Appellate Division in favor of the workers *without opinion*, reinstating the order and judgment of the New York Supreme Court for the reasons stated in the dissenting opinion of the Appellate Division. *See* App. A at p. 1a.

REASONS FOR GRANTING THE WRIT

A. The New York Court of Appeals Has Seriously Misapplied This Court's Decisions Concerning the Minimum Due Process Requirements For the Assertion of *In Personam* Jurisdiction.

The New York Court of Appeals held that the jurisdiction of state courts with respect to the interstate circulation of a job clearance order established by the Wagner-Peyser Act follows that job order wherever DOL might decide to send it. That holding assaults the decisions of this Court which define the standards for the assertion of *in personam* jurisdiction consistent with the due process requirements of the United States Constitution.

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), established the standard for the exercise of *in personam* jurisdiction by state courts over defendants who are not resident in those states: "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'." The minimum contacts analysis focuses on the conduct of the *defendant, not the plaintiff*. Any attempt to "shift the focus" of the presence of minimum contacts from the defendant to the plaintiff is tantamount to allowing "plaintiff's contacts with the forum [to be] decisive in determining whether the defend-

ant's due process rights are violated . . . [,] an approach . . . forbidden by *International Shoe* and its progeny." *Rush v. Savchuk*, 444 U.S. 320, 322 (1980). In the instant case, that is precisely what the New York Court of Appeals did; it "shifted the focus" of the jurisdictional inquiry from the grower-petitioners to the worker-respondents, thereby infringing upon the apple growers' Constitutional guarantees.

The real issue in this case was correctly framed by the majority opinion of the Appellate Division of the New York Supreme Court: "[W]hether defendants' clearance orders provided sufficient contacts with Puerto Rico to enable Puerto Rican courts to assert jurisdiction consistent with the due process clause of the United States Constitution." App. B at p. 10a. The level of contact had by the growers with Puerto Rico is uncontroverted—it begins and ends with *DOL's* transmittal of grower job clearance orders to Puerto Rico. The growers themselves had no offices in Puerto Rico, appointed no agents in Puerto Rico, never sent a single letter to Puerto Rico, never placed a single telephone call to Puerto Rico, and never went to Puerto Rico. The growers did absolutely *nothing* to "purposefully avail[] [themselves]" of the "benefits and protections" of Puerto Rico. *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978), *reh'g denied*, 438 U.S. 908 (1979). In fact, the growers were entirely ignorant of DOL's recruitment efforts in Puerto Rico until *after* DOL had started the recruitment process in Puerto Rico.

The principal basis for the decision of the New York Court of Appeals appears to be the conviction that the growers' job clearance orders are job "offers" that are subject to being unilaterally accepted by workers without further contact with the growers.[7] Grower job or-

[7] Even were the New York court correct in characterizing the clearance order as a contract, such single contact with the forum would not suffice to hale defendants into court in Puerto Rico. In *Rush v. Savchuk*, this Court refused to find the requisite affiliating

ders are in fact *not* job "offers" in that sense. They are merely formalized job notifications which workers might seek to pursue in accordance with the job interview and clearance procedures set forth in the job orders. Once a worker expresses an interest in a job reflected in the job order, the worker has the responsibility with the help of the employment service of making himself available for the job in accordance with the terms of the job order. To conclude that a job order constitutes a job "offer" would wreak havoc with employers. Once a job order is placed with the job clearance system, employers would have no way of knowing how many workers they might have "hired." They would have no idea whether the workers who accepted their job "offers" were truly qualified to perform the work. They would have no notion of what liabilities they might be exposed to by workers travelling to the employer's place of business from distant locations. The Wagner-Peyser Act which established the interstate clearance system did not contemplate such results. Moreover, if such results are permitted to stand, the interstate clearance system will almost certainly cease functioning. The threat of having to defend lawsuits that might be filed anywhere the job order could be sent in the United States is a risk that few employers—especially small employers—could reasonably afford to take.

The New York Court of Appeals also apparently predicated its due process analysis on the "fairness" of the worker-respondents and their mothers having to litigate

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contacts where the nonresident defendant's only contact with the forum was the contractual obligation of an insurer licensed to do business in that state to defend and indemnify him in connection with the suit: "[The insurer] is 'found' . . . in all 50 States and the District of Columbia. Under appellee's theory, the 'debt' owed to [defendant] Rush would be 'present' in each of those jurisdictions simultaneously." *Rush*, 444 U.S. at 330. This Court concluded that "[i]t is apparent that such a 'contact' can have no jurisdictional significance." *Id.*

in New York. The "fairness" of circumstances associated with whether state courts have *in personam* jurisdiction over nonresident defendants is entirely alien to the due process analysis guaranteed by the Constitution and mandated by this Court. The focus of the inquiry cannot be "fairness" to prospective plaintiffs but, under the Constitution, it must be the contacts of the would-be defendants with the forum state.[8] To say otherwise, is in effect, to elevate the convenience of one party over the Constitutional protections of the other.[9] This Court has repeatedly proclaimed that such simply cannot be done.

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[8] *Rush v. Savchuk*, 444 U.S. 320, 327 (1980) (". . . the inquiry must focus on the relationship among the defendant, the forum, and the litigation); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980) (". . . the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"); *Kulko v. Superior Court*, 436 U.S. 84, 97-98 (1978) (". . . [defendant herein] can hardly be said to have 'purposefully availed himself' of the benefits and protections of [the forum State]"); *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) (". . . [defendants] have [not] purposefully availed themselves of the privilege of conducting activities within the forum State").

[9] In addition to shifting impermissibly the due process analysis to plaintiffs alone, the assertion by the court below that plaintiff-workers would be left without a remedy should the Puerto Rico courts not be granted long-arm jurisdiction is factually erroneous. A number of the grower-petitioners have been sued by the very same Puerto Rican plaintiffs for the same alleged activities during the same 1978 harvest season in Federal District Court in New York. *See Juan Valderrama Rios, et al. v. Marshall, et al.*, No. 79. Civ. 5711 (S.D.N.Y., filed October 22, 1979) (class action lawsuit seeking monetary damages and injunctive relief against the New York growers). DOL's administrative complaint system is also available to all aggrieved workers, *see* 20 C.F.R. § 658.400 (1984), a system created specifically to investigate and resolve complaints by employees that an employer violated DOL's employment service regulations. In fact, following the 1978 harvest season, the New York State employment agency investigated and resolved 120 complaints filed by Puerto Rican workers.

The New York Court of Appeals essentially decreed that the Secretary of Labor of Puerto Rico was acting as the agent of the growers. Not so. The growers in reality were unaware of the recruitment efforts in Puerto Rico undertaken by DOL and Puerto Rico officials until *after* those efforts were well underway. What is more, DOL has a procedure whereby growers can designate state officials as their agents for recruitment.[10] In respect of the Secretary of Labor of Puerto Rico, the growers never executed that form. Absent some affirmative action by the growers to alter the normal relationship, the Secretary of Labor of Puerto Rico must be viewed as acting on behalf of Puerto Rican workers. This Court in the *Snapp* case in 1982 determined that officials of the Puerto Rican Commonwealth had a *parens patriae* interest in ensuring that the employment service system operated to the full benefit of Puerto Rican worker-residents. *Snapp, supra,* at 458 U.S. at 600. If Puerto Rican state officials may act *parens patriae* as agents to sue employers in the context of protecting workers' interests against growers, those same officials may not in the recruitment of those workers logically be acting as the agents of *growers* for purposes of conferring long-arm jurisdiction on Puerto Rican courts. In the present case, the grower-petitioners made no attempt to contact the Puerto Rican Secretary of Labor, received no communication from the Puerto Rican Secretary of Labor, and had no control over any of the actions of the Puerto Rican Secretary of Labor or any other official or instrumentality of the Puerto Rican government. As a result, there exists no basis whatsoever for the proposition that Puerto Rican officials acted as agents for the growers in the recruitment of Puerto Rican workers.

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[10] The Employment Security Manual of the U.S. Employment Service required inclusion of an executed Designation of Hiring Agent Form in any clearance order of an employer wishing to delegate hiring authority on someone other than himself.

The decision of the New York Court of Appeals destroys the Constitutionally protected due process rights of *all* employers who rely on the interstate clearance system as a means of recruiting workers. The opinion adopted by the New York Court of Appeals is fundamentally at odds with prior decisions of this Court. First, there was no contract between the growers and the workers, despite the lower court's efforts to presume that there was. Second, even if a contract can be said to have existed, a single contract/contact does not give rise to sufficient minimum contacts with Puerto Rico where all the essential elements of the "contract" were to have been executed in New York. Finally, the balance of equities does not fall to plaintiffs merely because of their modest socio-economic status. There are available remedies which do not entail the risk of imposing on defendant New York growers the burden of appearing in 50 States, the District of Columbia, and Puerto Rico —when such risk arises solely from the single act of submitting a job clearance order to a New York state employment service office.

B. Creation of *In Personam* Jurisdiction in All States to Which DOL May Send an Employer's Clearance Order Could Destroy the Wagner-Peyser Act's Interstate Clearance System.

The Wagner-Peyser Act established the employment service system. The purpose of that system was to provide a no-fee national clearinghouse for employers and workers in order to promote the important public policy objectives of reducing unemployment and stabilizing labor conditions throughout the states. The viability of the employment service system should be protected and promoted. Far from doing that, the decision of the New York Court of Appeals inflicts upon the system a wound that potentially is mortal.

In order for the employment service system to operate properly, DOL must be able to transmit job clearance orders to any area of the country where the residents are in need of employment. If by doing that, however, the employers whose job orders are circulated automatically subject themselves to the *in personam* jurisdiction of the state courts of *every state* to which the job order is sent, a burden will be imposed upon the system which it cannot reasonably be expected to withstand.

Under the New York Court of Appeals' ruling, merely by filing a job clearance order with his local employment office, an employer in Manchester, Vermont could end up being subjected to the jurisdiction of a Texas court located in El Paso 1,990 miles away; or an Oregon court located in Eugene 2,500 miles away; or a Hawaii court located in Honolulu 4,900 miles away. What is worse, that employer could be subjected to suits in each and every one of those courts *at the same time*. In a subsequent year, such employer, in the unlikely event he might choose to continue to use the system, could be subjected to *in personam* jurisdiction of courts in wholly different states despite the fact he never went to them, never called them, hired no agents in them, and beyond filing his job clearance order, had no contact with them whatsoever. At no time prior to this litigation did the grower-petitioners ever imagine that the simple act of filing a job clearance order at their local employment service office would subject them to suit in any state to which that job order might be transmitted. Once employers using the employment service system discover the implications for them embodied in the decision of the New York Court of Appeals in this case, no prudent employer who might otherwise use the employment service system is likely to continue doing so.[11] Allowing that

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[11] Use of the employment service system already is decreasing. The Public Affairs Office of DOL released figures from the latest Report of the Secretary of Labor to the Office of Management and

to occur is tantamount to gutting the employment service system and, in effect, repealing the Wagner-Peyser Act.

C. The Issue Is Dividing the Courts Which Have to Consider It.

It is vital that this Court resolve the controversy embodied in this litigation. Not only is the issue of paramount importance to the continued viability of the employment service system, it is also seriously dividing the state courts that are being asked to decide it.

The decision of the New York Court of Appeals is in direct conflict with two decisions of the state court in Maryland and one decision from the Commonwealth of Virginia which have considered precisely the same issue based on the events of the same 1978 harvest season.

In *Humberto Gregory-Ayala v. Rinehart Orchards, Inc.*, No. 83-3101 (Md. Dist. Ct. for Washington Cty. April 30, 1984), and *Julio Rodriguez, et al. v. Hepburn Orchards, Inc.*, No. 83-3102 (Md. Dist. Ct. for Washington Cty. April 30, 1984), the Maryland district court granted the defendant Maryland growers' motion for summary judgment, thus concluding that those defendants, based on the same facts presented in the New York case, lacked sufficient minimum contacts with Puerto Rico for that forum to assert jurisdiction within the bounds of due process.[12] Similarly, in *Fernando Varges Soto, et al. v. Orchard Management Company, et al.*, Law Nos. 4027-4056 (Va. Cir. Ct. for Frederick Cty. Sept. 13, 1984), the Virginia court likewise granted summary judgment

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Budget (unpublished), showing that the number of new and renewal users of the employment service system decreased from 16,500,000 in 1980 to 14,300,000 in 1983.

[12] The docket sheets of the Maryland court are included in App. E. The Maryland court did not issue an opinion. Plaintiffs have appealed the granting of summary judgment in defendant's favor.

to defendants on the same grounds as had the Maryland court.[13]

Two different state courts, therefore, have decided precisely the same due process issue as is presented here in direct contradiction of the decision of the New York Court of Appeals. While these are not decisions of the highest courts in Maryland and Virginia, the cases will undoubtedly reach that level. Moreover, there exist a welter of potential cases raising the same issue from West Virginia, Massachusetts, New Hampshire and other states. A ruling by this Court in the present case, therefore, will dispose of the cases currently pending before other state courts, obviate the filing of additional cases in other states, and otherwise fully serve the interest of judicial economy.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the decision of the New York Court of Appeals.

Respectfully submitted,

S. STEVEN KARALEKAS
CHARLES, KARALEKAS, MCCAHILL & WILSON
1250 Connecticut Avenue, N.W.
Suite 318
Washington, D.C. 20036
(202) 466-7330
Attorney for Petitioners

Of Counsel:
CHARLES, KARALEKAS, MCCAHILL & WILSON
THOMAS E. WILSON

Dated: May 6, 1985

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[13] The Virginia court issued its decision in letter form, stating that it would issue an opinion at a later time. To date, no opinion has been issued by the court. *See* App. D. This decision has also been appealed.

APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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3 No. 11

NELLY RIOS, *et al.*,
Appellants,

v.

ALTAMONT FARMS, INC.,
Respondent.

(and eight other actions.)

[Feb. 5, 1985]

DECISION COURT OF APPEALS

Order reversed, with costs, and the order and the judgment of Supreme Court, Albany County, reinstated for reasons stated in the dissenting opinion by Justice Howard A. Levine at the Appellate Division (100 AD2d 411-418). Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur.

APPENDIX B

STATE OF NEW YORK
SUPREME COURT
APPELLATE DIVISION
THIRD DEPARTMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department at the Justice Building, in the City of Albany, New York, commencing on the 3rd day of January, 1984.

PRESENT: HON. A. FRANKLIN MAHONEY,
Presiding Justice,

HON. T. PAUL KANE
HON. JOHN T. CASEY
HON. LEONARD A. WEISS
HON. HOWARD A. LEVINE
Associate Justices.

NELLY RIOS, Individually and as the legal representative of her son, JUAN VALDERRAMA RIOS; PABLO CEPEDA QUINONES; JUAN NUNEZ AQUINO; ROBERT SANTIAGO GOMEZ; FEDERICO ALBERT COLON; FELIX DAVILA FUENTES; RICARDO NAVARRO RIVERA; SILVA ESTHER RESTO JAIME, Individually and on behalf of his son, JOSE DANIEL FIGUEROA SANDOVAL; MONSERRATE RIVERA, Individually and as legal representative of his son, EDWIN AMEZQUITA RIVERA; JUSTO M. VELEZ, Individually and as legal representative of his son, GILBERTO MELINA MIRANDA; JESUSA VASQUEZ, Indi-

vidually and as legal representative of her son, ARMANDO ROBLES VASQUEZ,

Respondents,

v.

ALTAMONT FARMS, INC.,

Appellant.

(And Eight Other Actions.)

The appellant having appealed from an order of the Supreme Court of Ulster County, entered on the 1st day of March, 1983, in the office of the clerk of the County of Ulster, and from a judgment entered on the 18th day of May, 1983, in the office of the clerk of the County of Ulster, and said appeal having been presented during the above stated term of this Court and having been argued by S. Steven Karalekas, Esq., of counsel for the appellant and by Howard Schell Reilly, Esq., of counsel for the respondents, and, after due deliberation, the Court having rendered a decision on the 12th day of April, 1984, Justice Howard A. Levine dissenting, it is hereby,

ORDERED, that the order and judgment be modified, on the law, by reversing so much thereof as granted plaintiffs' cross motion for summary judgment; the cross motion for summary judgment be denied and summary judgment awarded to the defendants dismissing the complaints; and, as so modified, affirmed, without costs.

/s/ Michael J. Novack
Clerk

ENTER:

Dated and Entered: May 2, 1984

A TRUE COPY

/s/ Michael J. Novack
Clerk

SUPREME COURT
APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

46331

April 12, 1984

NELLY RIOS, Individually and as Legal Representative of JUAN VALDERRAMA RIOS, *et al.*,
Respondents,

v.

ALTAMONT FARMS, INC.,
Appellant.

(And Eight Other Actions.)

Order and judgment modified, on the law, by reversing so much thereof as granted plaintiffs' cross motion for summary judgment; cross motion for summary judgment denied and summary judgment awarded to defendants dismissing the complaints; and, as so modified, affirmed, without costs.

Opinion per KANE, J.

MAHONEY, P.J., CASEY and WEISS, JJ., concur; LEVINE, J., dissents in an opinion.

STATE OF NEW YORK
SUPREME COURT
APPELLATE DIVISION
THIRD DEPARTMENT

#46331

NELLY RIOS, Individually and as Legal Representative of JUAN VALDERRAMA RIOS, *et al.*,
Respondents,

—against—

ALTAMONT FARMS, INC.,
Appellant.

(And Eight Other Actions.)

Argued, January 10, 1984.

Before:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. T. PAUL KANE,
HON. JOHN T. CASEY,
HON. LEONARD A. WEISS,
HON. HOWARD A. LEVINE,
Associate Justices.

APPEAL (1) from an order of the Supreme Court at Special Term (Lawrence E. Kahn, J.), entered March 1, 1983 in Ulster County, which, *inter alia*, granted plaintiffs' cross motion for summary judgment, and (2) from the judgment entered thereon.

RUSK, RUSK, PLUNKET & WADLIN, Main Street, P. O. Box 727, Marlboro, New York 12542, and CHARLES, KARALEKAS, McCAHILL & WILSON (S. Steven Karalekas of counsel), 1250 Connecticut Avenue, N.W., Suite 318, Washington, D.C. 20036, for appellant.

HOWARD SCHELL REILLY and THOMAS A. HARNETT (Gretchen Coll-Marti of counsel, Puerto Rico Legal Services, Migrant Division, Casilla Postal BT, Rio Piedras, Puerto Rico 00928), c/o Farmworkers Legal Services of New York, Inc., 180 Liberty Street, Newburgh, New York 12550, for respondents.

OPINION FOR MODIFICATION

KANE, J.

Plaintiffs, Puerto Rican migrant farm workers and members of their families, seek in these actions to enforce default judgments entered in Puerto Rico against defendants, who are apple growers located in New York State. The Puerto Rican default judgments grew out of the 1978 apple harvest season in New York. In the spring of that year, as in prior years, the apple growers in question applied to the Federal government for permission to employ temporary foreign labor to harvest their apples. Consequently, the background in this case involves the interaction of two Federal statutes, the Wagner-Peyser Act (US Code, tit 29, § 49 *et seq.*) and the Immigration and Nationality Act of 1952 (US Code, tit 8, § 1101 *et seq.*).

The Wagner-Peyser Act, among other things, established the United States Employment Services "[i]n order to promote the establishment and maintenance of a national system of public employment offices" (US Code, tit 29, § 49). Pursuant to the authority conferred by the Wagner-Peyser Act, the United States Secretary of Labor has established an interstate clearance system

to "provide employers a means of recruiting nonlocal workers, when the supply of local workers is inadequate" (*Alfred L. Snapp & Son* v. *Puerto Rico*, 458 US 592, ——, 102 S Ct 3260, 3262-3263; see, also, 20 CFR 602 [c]). If local workers are not available, a "clearance order" is sent through the Employment and Training Administration of the Department of Labor to other State labor agencies in order to give them an opportunity to meet the request.

As detailed by the United States Supreme Court in *Alfred L. Snapp & Son* v *Puerto Rico* (*supra*), some of defendants' obligations under the Wagner-Peyser Act come from the Immigration and Nationality Act which regulates the admission of nonimmigrant aliens into the United States. This act authorizes the admission of temporary foreign workers into this country only "if unemployed persons capable of performing such service or labor cannot be found in this country" (US Code, tit 8, § 1101, subd [a], par [15], cl [H], subcl [ii]). The initial responsibility for determining whether enough qualified United States workers are available to fill a need is vested with the United States Secretary of Labor (see *Alfred L. Snapp & Son* v *Puerto Rico*, *supra*, p 3263).

Defendants, who desired to employ temporary foreign agricultural laborers, were, therefore, required to initially seek domestic workers through the interstate clearance system. Defendants were thus directed to file an application with the local (Kingston) office of the New York State Employment Service, together with a sample job offer (20 CFR 655.201 [a][1], [b][1]). According to regulation, a local office which receives a job order first attempts to recruit workers in the local labor market (20 CFR 653.501 [d][7]).[1] In the event sufficient local workers cannot be recruited, the local office places the job order into the *intrastate* clearance system for recruitment of workers throughout the State (20 CFR

[1] This regulation was contained in 20 CFR 653.108 in 1978.

653.501[d][7],[e][2]). If the State agency is also unable to recruit sufficient workers within the State, that agency places the job order into the *interstate* clearance system for circulation to areas of the country where there exists an oversupply of the needed workers (20 CFR 653.501[e][2]). The United Department of Labor determines the areas of supply to which job orders will be sent (20 CFR 653.501[e][3]). This is also true in regard to clearance orders submitted in connection with applications for temporary foreign workers (20 CFR 655.205[a]). In the instant case, the orders were sent to several States and Puerto Rico,[2] and the Puerto Rican Department of Labor recruited persons to work defendants' farms.

The clearance orders sent by defendants and the circumstances surrounding the recruitment of workers were apparently all the same.[3] In this regard, the clearance order sent by defendant Altamont Farms, Inc., dealing with referral instructions, stated "Bill Paladino, 914 795-2171" was the person to contact, and the clearance order stated that collect calls would be accepted "only from officials of Employment Service Offices". It is un-

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[2] As used in the Wagner-Peyser Act, the word "State" includes Puerto Rico (US Code, tit 29, § 49a, subd [5]). It should be noted, however, that when defendant Altamont Farms, Inc. submitted its clearance order in March, 1978, it was informed that said order would not be submitted to Puerto Rico. In August, 1978, when certain statutory problems were resolved, the clearance order was submitted to Puerto Rico.

[3] Although the record does not contain the clearance orders sent by each defendant, all parties refer to the clearance order sent by defendant Altamont and the recruitment of workers as an example of the facts involving all defendants. It should also be noted that the various actions were consolidated upon plaintiffs' cross motion. This cross motion was made subsequent to defendant Altamont's motion for summary judgment in *Rios* v *Altamont Farms, Inc.* In their motion to consolidate, plaintiffs, who are all represented by the same attorney's office, assert that all cases present the same legal issue as to jurisdiction.

controverted that at no time did either a Puerto Rican worker or the Puerto Rican Department of Labor contact defendant Altamont. Indeed, the testimony of Manuel Rodriguez Escalera, the Associate Director of the Immigration Division of the Commonwealth of Puerto Rico Department of Labor, indicates that Puerto Rican workers were recruited *without* the growers being contacted. Moreover, at *no time* did Altamont execute a "Designation of Hiring Authority" (US Department of Labor—Form ES-569), authorizing either the Department of Labor or the Puerto Rican Department of Labor to act as its agent for the purposes of hiring.

Subsequently, defendant Altamont was informed that its request for temporary labor certification was being denied in part because a number of Puerto Ricans had accepted its clearance order. Certain Puerto Rican workers then arrived at defendant Altamont's orchards. Thereafter, however, problems apparently developed and many of the workers returned home. Plaintiffs, the returned workers, together with members of their families in some cases, then commenced the underlying actions in the Superior Courts of Puerto Rico against defendant Altamont and other apple growers and were awarded default judgments for breach of contract and tort claims arising out of the 1978 harvest season. In the present New York State actions, plaintiffs seek to enforce those judgments. Defendant Altamont moved for summary judgment dismissing the action commenced against it upon the ground that the underlying default judgment was void because the Puerto Rican court lacked personal jurisdiction over it. Plaintiffs then cross-moved to consolidate *Rios* v *Altamont Farms, Inc.* with the subject eight other actions and for summary judgment against all defendants. Special Term consolidated all actions and after concluding that Puerto Rico properly asserted jurisdiction over all defendants, granted summary judgment in favor of plaintiffs. This appeal by defendants ensued.

The Puerto Rican judgments must be given full faith and credit in the courts of New York (*Americana of Puerto Rico* v *Kaplus*, 368 F 2d 431, 437, cert den 386 US 943) unless the Puerto Rican courts failed to acquire personal jurisdiction over defendants (*Durfee* v *Duke*, 375 US 106, 109). Although a judgment may be collaterally attacked because jurisdiction was not proper under the statutes of the forum State (*Hunt* v *Dawson County, Montana*, 623 F 2d 621), in this case, the Puerto Rican judgments are valid so long as due process is satisfied because Puerto Rico extends its jurisdiction (P.R. Laws Ann., tit 32, appendix II, rule 4.7) to the fullest extent permitted by the due process clause (*Integrated Inds.* v *Continental Milling Co.*, 385 F Supp 883; *Remon Vela, Inc.* v *Sagner*, 382 F Supp 478). Accordingly, the issue presented on appeal is whether defendants' clearance orders provided sufficient contacts with Puerto Rico to enable the Puerto Rican courts to assert jurisdiction consistent with the due process clause of the United States Constitution.

In order to maintain fairness and interstate federalism (see Braveman, Interstate Federalism and Personal Jurisdiction, 33 Syracuse L Rev 533), due process only permits a State court to render a valid personal judgment against a nonresident defendant if that defendant has sufficient minimum contacts which make subjecting defendant to a suit in that State consistent with "traditional notions of fair play and substantial justice" (*International Shoe Co.* v *Washington*, 326 US 310, 316, quoting *Milliken* v *Meyer*, 311 US 457, 463). These contacts must be the result of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*Hanson* v *Denckla*, 357 US 235, 253). This rule "is not susceptible of mechanical application; rather, *the facts of each case must be weighed*" (*Kulko* v *California Superior Ct.*, 436

US 84, 92 [emphasis added]). The factors to be considered in this analysis include:

> * * * the burden on the defendant * * * the forum State's interest in adjudicating the dispute * * * the plaintiff's interest in obtaining convenient and effective relief * * * the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies * * * (*World-Wide Volkswagen Corp.* v *Woodson*, 444 US 286, 293 [citations omitted]).

It appears from the record that defendant apple growers had *no* contact with the Commonwealth of Puerto Rico other than the fact that their clearance orders, which they had filed with their local employment offices in this State, were forwarded to Puerto Rico at the direction of the United States Department of Labor. In our opinion, such contact is insufficient to enable the Puerto Rican courts to assert jurisdiction consistent with the due process clause. Contrary to plaintiffs' assertion, we fail to find that the forwarding of defendants' clearance orders to Puerto Rico by the United States Department of Labor was an activity of defendants by which they purposefully availed themselves of the privilege of conducting activities within Puerto Rico, thus invoking the benefits and protections of Puerto Rican law. As detailed above, the clearance order was not sent to Puerto Rico at the request of defendants. In fact, it is uncontroverted that defendants' desire was to secure permission to employ temporary *foreign workers*. In this regard, they filed applications for temporary foreign labor certification with the *local office* of the New York State Employment Service. If the local office had located sufficient qualified workers, the clearance orders would not have been sent to Puerto Rico by the United States Labor Department. Indeed, it was not the decision of defendants to forward the clearance orders to Puerto Rico, but

rather was the decision of the United States Department of Labor. Moreover, defendants took no action in Puerto Rico with respect to the clearance orders. As discussed previously, there was no contact between the Puerto Rican workers and defendants until the workers arrived in New York. In sum, it is this court's opinion that the fortuitous nature of defendants' sole contact with Puerto Rico is insufficient to satisfy the requirements of due process.

Neizil v *Williams* (543 F Supp 899), *Garcia* v *Vasquez* (524 F Supp 40) and *Acker* v *Hepburn Orchards* (US Dist Ct, MD Fla, Nov. 29, 1982, Castagna, J.) are factually distinguishable from the present case, for the more intensive, and direct recruitment efforts by defendants in those cases provided some evidence that defendants therein purposefully availed themselves of the privilege of conducting activities within the forum State.

That portion of plaintiffs' cross motion seeking summary judgment should, therefore, have been denied and summary judgment should have been granted in favor of all defendants dismissing the complaints.

The order and judgment should be modified, on the law, by reversing so much thereof as granted plaintiffs' cross motion for summary judgment; the cross motion for summary judgment should be denied and summary judgment awarded to defendants dismissing the complaints; and, as so modified, affirmed, without costs.

LEVINE, J. (dissenting).

As I read the majority's decision, reliance is placed on three basic points to support a holding that due process was violated when the Puerto Rican courts asserted in personam jurisdiction over defendants in adjudicating plaintiffs' claims: (1) that defendants did nothing beyond the single isolated act of filing clearance orders in their local State employment offices; the transmittal of the clearance orders to Puerto Rico was purely a result

of the operation of the Federal bureaucratic machinery and, hence, was involuntary as to defendants; (2) that the recruitment of farm laborers in Puerto Rico was not for defendants' benefit because, actually, they wanted to recruit Jamaican workers; and (3) that the activities of Puerto Rican Labor Department officials in recruiting workers cannot be attributed to defendants because they did not execute a designation of hiring authority for the Puerto Rican Labor Department to act as their agent for purposes of hiring. These grounds either fail to fully reflect all of the facts contained in the record or are irrelevant for purposes of determining whether due process was violated here.

The record establishes the following uncontested facts: defendants, all members of a regional apple growers' association, desired to recruit Jamaican workers to pick apples for the fall, 1978 harvest. However, under the Wagner-Peyser Act (US Code, tit 29, § 49 *et seq.*) and the Immigration and Nationality Act of 1952 (US Code, tit 8, § 1101 *et. seq.*), this could not be accomplished without first giving available workers in certain regions of high unemployment in the United States and its territories an opportunity to fill all openings through the procedures of the interstate clearance system. This entailed defendants filing clearance orders with their local State employment offices for transmittal to similar local offices in the designated regions. The orders signed by defendants expressly listed "Federal Region II", which included New York, Puerto Rico and the Virgin Islands, as among the regions targeted for such distribution. Although perhaps defendants were led to understand that Puerto Rico was not a region included for distribution of their clearance orders when they initially filed them in March, 1978, the record uncontestably establishes that they were made aware that the job orders were physically delivered to Puerto Rican employment offices in early August, 1978, still well before the date harvesting was to commence in September. Defendants were kept informed

of the progress of recruitment in Puerto Rico and, at one point, were told that because of the success of those efforts, their request for authorization to hire alien workers was denied.

Moreover, also in August, 1978, defendants participated through their growers' association in a suit in the Federal District Court to compel the United States Labor Department and Immigration Service to permit recruitment of foreign workers. In that action, they specifically assured the court that if the ban on foreign workers was lifted, they would still give priority to available Puerto Rican workers. Once defendants' clearance orders reached Puerto Rico, the following activities took place: first, the Commonwealth employment service widely publicized the job offers and recruited workers for over 2,000 harvesting positions in New York and elsewhere. Responding Puerto Rican farm laborers were then screened in two respects, i.e., their commitment to accepting the positions and their suitability, which entailed requiring applicants to submit certificates of good health and of lack of a criminal record. It is also an uncontested fact that the procurement and screening process continued throughout the month of August, 1978. During the course of the recruitment and screening process, defendants were advised of the numbers and names of workers whom they should expect to arrive to fill the requested positions. Services were also provided to expedite their embarkation by plane to the United States. Shortly after arriving at defendants' orchards in early September, however, the recruited workers were discharged. This happened to coincide with the successful conclusion of defendants' Federal action seeking relief from restrictions on their hiring Jamaican laborers. Plaintiffs then brought the lawsuits in Puerto Rico which are the subject of this appeal, the gravamen of which were for breach of contract. The judgments plaintiffs seek to enforce here granted each plaintiff direct and consequential damages for such breach of contract.

It is upon the totality of the foregoing facts and not selective elements thereof that the due process issue must be determined. As the majority correctly notes, the basic test deciding whether a forum State can exercise extra-territorial in personam jurisdiction is derived from the test set forth in *International Shoe Co.* v *Washington* (326 US 310, 316) that due process requires sufficient "minimum contacts" which make subjecting defendant to a suit in that State consistent with "traditional notions of fair play and substantial justice". Subsequent cases make clear that each of the two parts of the test are independently significant and must be weighed and balanced (see, generally, *World-Wide Volkswagen Corp.* v *Woodson*, 444 US 286, 291-294).

The minimum contacts element of the test primarily centers on whether a defendant engaged in activities in the forum State by virtue of which he "purposely" availed himself of the benefits and protection of the laws of that State (*World-Wide Volkswagen Corp.* v *Woodson, supra*, p. 295; *Hanson* v *Denckla*, 357 US 235, 253). It is now settled, however, that the requisite minimum contacts can be established without the defendant having ever physically entered or acted in the forum State; the test can be satisfied solely through a defendant's *communications* to that State (*McGee* v *International Life Ins. Co.*, 355 US 220, 222-223; see, also, *Parke-Bernet Galleries* v *Franklyn*, 26 NY2d 13). The minimum contacts requirement is also significantly more easily met when the suit arises out of the very activities brought about by the defendant in the forum State (see *McGee* v *International Life Ins. Co., supra*, p. 223; *International Shoe Co.* v *Washington, supra*, p. 321; *Thompson* v *Ecological Science Corp.*, 421 F.2d 467, 470). As applied to contract litigation, such as the cases at bar, it has been held that due process is satisfied if the suit arises out of a contract which had a "substantial connection" with the forum State (*McGee* v *International Life Ins. Co., supra*, p. 223). A State's power to

assert jurisdiction in contract cases is not dependent on conceptualistic rules concerning the place of contracting or of performance (*Travelers Health Assoc.* v *Virginia*, 339 US 643, 648). Our own courts, applying this criterion in the converse situation where New York claimed the right to adjudicate contract claims against nonresidents, have examined the *entire* transaction involving the contract and have found sufficient "substantial connection" on the basis of events in New York *preliminary or subsequent* to its execution (*Longines-Wittnauer Watch Co.* v *Barnes & Reinecke*, 15 NY2d 443, 457, cert den 382 US 905; *Lynch* v *Austin*, 96 AD2d 196; *Collateral Factors Corp.* v *Meyers*, 39 AD2d 27, 29).

The second facet of the *International Shoe Co.* test, i.e., whether maintenance of the suit offends notions of fair play and substantial justice, deals with equity and policy considerations. It requires inquiry directed toward the relative burdens placed upon plaintiff and defendant if each were compelled to litigate their dispute in the other party's home jurisdiction and whether the forum State has a legitimate interest in adjudicating the dispute (*World-Wide Volkswagen Corp.* v *Woodson*, *supra*, p. 292).

Measured by all of the foregoing criteria, I have no difficulty in finding that defendants' activities constituted sufficient minimum contacts with Puerto Rico to subject them to breach of contract suits there, completely consistent with fair play and substantial justice. To begin with, defendants' clearance orders represented formal offers to contract with responding workers, containing all the essential terms and conditions of employment, including rates of pay, the date work was to begin and even provisions for financing transportation of the workers from the place of recruitment to the work sites. The orders, signed by each defendant, state "THIS JOB OFFER DESCRIBES THE ACTUAL TERMS AND CONDITIONS OF THE EMPLOYMENT *BEING OFFERED*

BY ME AND CONTAINS ALL OF THE MATERIAL TERMS AND CONDITIONS OF THE JOB" (emphasis added). Clearance orders have been so construed by the Federal courts (*Aquero* v *Christopher*, 431 F. Supp. 1272, 1274; *Aquero* v *Usery*, US Dist Ct, SD Tex, May 2, 1976, Garza, J.).

There can be no question whatsoever that in filing the orders in local New York State employment offices, defendants deliberately set in motion the job recruitment machinery of the interstate clearance system. Thus, defendants did not merely acquiesce in the transmission of the clearance orders to other States and territories; each of them purposefully sent into the stream of interstate commerce a legally operative written instrument to be used both as a means of recruiting out-of-State labor and as the basis for contracts of employment with responding workers. Defendants were also well aware that their clearance orders reached Puerto Rico and were being acted upon there. They received communications concerning the progress of recruitment which must have originated from Puerto Rican labor officials and, as previously noted, in their Federal action to gain entry of Jamaican workers, they assured the court that they would respond favorably to recruitment efforts in Puerto Rico.

The record equally belies any contention that the activities of the Puerto Rican Labor Department were not for defendants' benefit. If, as the majority suggests, defendants' ulterior motive here was always to circumvent requirements of the Federal Immigration and Nationality Act so as to be able to recruit Jamaicans, the plain and unavoidable fact is that *the recruitment process in Puerto Rico had to take place in order for defendants to accomplish their ultimate objective.* This alone, in my view, dispels any inference that the recruitment process was not at least partially for the benefit and at the behest of these defendants. Indeed, certain of the activi-

ties performed by Puerto Rican governmental authorities were *exclusively* for defendants' benefit. The screening of laborers' health and police records can hardly be considered to have been in the interest of anyone but defendants. Likewise, under the terms of the clearance orders, defendants were liable for the workers' transportation expenses, to be paid either by advancing funds or reimbursing amounts spent by the workers or the Puerto Rican government for that purpose. Therefore, when government agents arranged transportation, they aided defendants in discharging that contractual obligation.

The activities defendants thus engendered were more than sufficient to satisfy the basic minimum contacts criteria of *International Shoe Co.* For their own commercial self-interest, defendants elected to import migrant workers through the channels of interstate commerce. They further elected to take advantage of the expense-free hiring procedures of the interstate clearance system. These purposeful acts were undertaken with certain awareness that job offers would be disseminated and acted upon in Puerto Rico. They availed themselves of recruitment, screening and logistical services created under Puerto Rican laws and performed by Commonwealth employees. The conclusion is, therefore, inescapable that defendants' purposefully and knowingly availed themselves of the benefits and protections established by Puerto Rican law. Nor can this conclusion be avoided by stressing that defendants never signed designations of hiring authority. No formal agency relationship is required in order to hold defendants responsible for the acts of others on their behalf which they initiated through their communications (see *Parke-Bernet Galleries* v *Franklyn*, 26 NY2d 13, 18, *supra*).

Examination of the entire transaction involving the employment contracts on which plaintiffs' suits are based also demonstrates the existence of a "substantial connection" with the forum State sufficient to satisfy due

process. The offers to contract were physically delivered and distributed in Puerto Rico. Arguably, the offers were accepted there when plaintiffs made commitments to fill the harvesting positions, so that formation of the contracts was completed in Puerto Rico. At the least, significant preliminary steps leading to contract formation took place in Puerto Rico, including the performance of various conditions that defendants stipulated for in the clearance orders. These preliminary steps, including the making of commitments, obtaining medical and police clearances, advancing the costs of air transport and actual embarkation, constituted either part performance or foreseeable detrimental action in reliance so as to have made defendants' offers irrevocable and legally binding before any plaintiff set foot in New York (see 1 Corbin, Contracts, §§ 49, 51). Puerto Rico's substantial connection with the contracts of employment out of which plaintiffs' suits arose was far greater here than that presented in *McGee* v *International Life Ins. Co.* (355 US 220, *supra*). In *McGee*, a Texas insurer mailed to a California resident a single offer to continue life insurance coverage. The insured responded by mailing premiums from California to Texas. The Supreme Court held that those communications alone sufficiently connected California to the contract of insurance to permit the California courts to exercise personal jurisdiction over the insurer in a suit on the policy. Here, job offers were delivered to Puerto Rico and extensively communicated through the media there. The response to the job offers in Puerto Rico by plaintiffs and governmental agents in terms of expenditure of time, effort and money need not be repeated. *McGee* should, therefore, be a fortiori controlling.

Plaintiffs' case for valid jurisdiction is even more easily made when it is considered in terms of its consistency with traditional notions of fair play and substantial justice, the balance of the *International Shoe Co.* test.

Indeed, on the basis of comparing the relative burdens of litigation in a foreign jurisdiction and assessing the forum State's interest in the litigation, it more aptly might be said that fair play and justice *demand* that plaintiffs be permitted validly to litigate their claims in their home forum. Plaintiffs here are impoverished, English-illiterate farm workers. Economic and logistical realities render them totally incapable of obtaining legal redress for their complaints in the courts of New York. Defendants, on the other hand, are ongoing business entities. They have already demonstrated their willingness to act collectively and share the costs of litigation in the Federal courts, as well as in the New York courts in the matter now before us. It may reasonably be assumed that the common defense to all of the claims asserted by these plaintiffs would basically entail testimony from a few supervisory employees concerning defendants' justification for discharging plaintiffs. Imposing the burden of producing such witnesses in Puerto Rico hardly amounts to a denial of due process, when a converse ruling effectively would confer total immunity from suit upon defendants (see *McGee* v *International Life Ins. Co.*, 355 US 220, 223-224, *supra*; *Travelers Health Assoc.* v. *Virginia*, 339 US 643, 648-649, *supra*). The manifest and legitimate interest of Puerto Rico in obtaining redress for its citizens and protecting their contractual rights is also clear. That interest has already been recognized by the United States Supreme Court as being sufficient to give the Commonwealth independent standing to sue in the Federal courts on behalf of its workers on related claims (*Alfred L. Snapp & Son* v *Puerto Rico*, 458 US 592, 1002 S Ct 3260).

For all of the foregoing reasons, I vote in favor of upholding the jurisdiction of the only forum where these plaintiffs can obtain a just determination of their causes —the courts of the Commonwealth of Puerto Rico.

APPENDIX C

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ULSTER

NELLY RIOS, Individually and as the legal representative of her son, JUAN VALDERRAMA RIOS; PABLO CEPEDA QUINONES, JUAN NUNEZ AQUINO, ROBERTO SANTIAGO GOMEZ, FEDERICO ALBERT COLON, FELIX DAVILA FUENTES, RICARDO NAVARRO RIVERA, SILVIA ESTHER RESTO JAIME, Individually and as legal representative of her son, ANGEL LUIS GRACIA RESTO; DANIEL FIGUEROA RAMOS, Individually and on behalf of his son, JOSE DANIEL FIGUEROA SANDOVAL; MONSERRATE RIVERA, Individually and as legal representative of his son, EDWIN AMEZQUITA RIVERA; JUSTO M. VELEZ, Individually and as legal representative of his son, GILBERTO MEDINA MIRANDA; JESUS A. VASQUEZ, Individually and as legal representative of her son, ARMANDO ROBLES VASQUEZ,

Plaintiffs,

—against—

ALTAMONT FARMS, INC.,

Defendant.

Supreme Court, Albany County Special Term
July 29, 1982—Calendar No. 3

JUSTICE LAWRENCE E. KAHN, Presiding

APPEARANCES:

Farmworker Legal Services of
New York, Inc.
Howard Schell Reilly
Gladys E. Braxton
Attorneys for plaintiffs
180 Liberty Street
Newburgh, New York 12550
(914) 562-2107

Rusk, Rusk, Plunket & Wadlin, Esqs.
Attorneys for defendant
ALTAMONT FARMS, INC.
P.O. Box 727
Marlboro, New York 12542
(914) 236-4411

(of Counsel):

Charles, Karalekas, Bacas
& McCahill, Esqs.
S. Stephen Karalekas, Esq.
Thomas J. Bacas, Esq.
1250 Connecticut Avenue, N.W.
Suite 318
Washington, D.C. 20036
(202) 466-7330

KAHN, J.

In the action entitled Rios, et al v Altamont Farms, Inc., plaintiffs move to enforce a judgment heretofore entered by default in Puerto Rico. Defendant seeks dismissal upon the premise that the Puerto Rican Court did not acquire in personam jurisdiction in the litigation before it. If Puerto Rico did acquire personal jurisdiction over defendant, the default judgment entered therein is entitled to full faith and credit in the State of New York (*San Juan Hotel Corp. v Greenberg*, 502 F. Supp. 34; *Americana of Puerto Rico, Inc. v Kaplus*, 368 F. 2d 431). However, if proper jurisdiction over the defendant was not acquired, the judgment may not be given full faith and credit by the courts of this State (*Durfee v Duke*, 375 U.S. 106).

The pertinent facts necessary to resolve this motion are not in dispute. Thus, summary judgment is an appropriate remedy (*Falk v Goodman*, 7 NY2d 87). Plaintiffs are migrant farm workers residing in the Commonwealth of Puerto Rico. Defendant, Altamont Farms, Inc. (hereinafter Altamont), is an apple grower located in

the Hudson Valley Region of New York State. On March 28, 1978, Altamont submitted a Clearance Order-Rural Manpower Job Offer to the Interstate Clearance System established by the Wagner-Peyser Act, (29 U.S.C., sec 49). The submission was required because Altamont intended to hire foreign workers in the event that a sufficient domestic labor supply was not available. The Act's purpose is "to provide two assurances to United States workers, including the citizens of Puerto Rico. First, these workers are given a preference over foreign workers for jobs that become available within this country. Second, to the extent that foreign workers are brought in, the working conditions of domestic employees are not to be adversely affected, nor are United States workers to be discriminated against in favor of foreign workers" (*Snapp & Son, Inc., et al v Puerto Rico*, 458 U.S. 592; No. 80-1305, decided July 1, 1982). Thus, Altamont was required to file the Clearance Order pursuant to Federal Labor Department regulations in that it had made application for alien employment certification. The U.S. Department of Labor ultimately transmitted defendant's Clearance Order to the Commonwealth of Puerto Rico. Thereafter, the Puerto Rican Department of Labor and Human Resources made it available to potential workers, including the plaintiffs herein.

In resolving the issue of whether the courts of Puerto Rico acquired personal jurisdiction over Altamont, the test is twofold. It must be shown both that its long-arm statute was satisfied and that due process standards have been met (*International Shoe Co. v Washington*, 326 U.S. 310). Puerto Rican Courts may exercise long-arm jurisdiction with respect to Altamont "if an action or claim arises as the result of that person transacting business or committing any tortious act within Puerto Rico, either personally or through an agent." (Rules of Civil Procedure of the Commonwealth of Puerto Rico, rule 4.7). The burden of establishing in personam jurisdiction rests with the plaintiff (*Jetco Electronic Industries, Inc. v Gardiner*, 473 F. 2d 1228). While this court should con-

sider the pleadings and affidavits most favorably in plaintiffs' terms, nevertheless, the burden does not shift. In rendering its judgment by default, the Superior Court of the Commonwealth of Puerto Rico concluded that it had jurisdiction over the subject matter of the action and over the person of the defendant, by virtue of the transaction of business by the defendant in the Commonwealth of Puerto Rico through the circulation of an offer of employment for agricultural workers, and through recruitment of agricultural workers in Puerto Rico.

The Clearance Order filed by defendant with the State of New York and the United States Employment Service was clearly a job offer. Defendants could have reasonably foreseen that it would be transmitted to Puerto Rico and those other states which were known to have surplus labor available. At no time did defendant withdraw this job offer, and in fact, defendant ratified contracts with plaintiffs by accepting them upon their arrival at the orchards. Defendants were not mandated to solicit employees from Puerto Rico, and could have withdrawn their Clearance Order at any time. The procedure only became mandated because they had a desire to employ foreign workers, and they therefore voluntarily filed the mandated Clearance Order. By doing so, they accepted the benefits, obligations and liabilities that thereafter arose and which naturally flowed from the filing of the job offers, thereby enveloping them within the purview of Puerto Rico's long-arm jurisdictional statute. Therefore, in order to acquire personal jurisdiction, only "minimum contacts" with the foreign state must have occurred so that "traditional notions of fair play and substantial justice" will not be offended by the maintenance of the suit (*International Shoe*, supra). This standard of minimum contacts is one of reasonableness, with the facts of each case to be weighed individually to determine whether the requisite circumstances exist (*Kulko v Superior Court of California*, 436 U.S. 84). "[W]hile very

little purposeful activity within a state is necessary to satisfy the minimum contacts requirement, we have, nevertheless, unequivocally required some activity by the defendant before permitting the exercise of in personam jurisdiction . . . the jurisdictional touchstone being the presence of sufficient in-state business activity to indicate the purposeful enjoyment of the benefits and protections of the state's law." (*Benjamin v Western Boatbuilding Corp.*, 472 F. 2d 723, 726).

Pursuant to the above standards, Puerto Rico's assertion of jurisdiction under its statute is not violative of the due process clause of the Fourteenth Amendment to the United States Constitution. It is clear that the broad social purpose of the Wagner-Peyser Act and the protections imposed thereunder, as to the temporary foreign worker regulations, would be negated by permitting employers to utilize such procedures and then reneging on their contractual offer without allowing recourse to the employees who suffer damages in their home state or territory. Defendants made a business judgment to seek foreign labor with the knowledge that they would place themselves within the mandated rules and regulations of the Federal Government. They were aware that their job offer would be forwarded to surplus labor areas such as Puerto Rico and further, were aware that, in reliance thereon, such solicited employees would foreseeably accept their offer and travel to defendant's place of business in the State of New York. At no time did defendant withdraw its job offer or in any way attempt to stop the machinery which would inevitably bring Puerto Rican laborers to their orchards. By doing so, they subjected themselves to the jurisdiction of the Courts of Puerto Rico. The defendant had the right to defend itself and have its day in court in the Commonwealth of Puerto Rico, but chose not to do so. Having made this decision, they are bound thereby.

Finally, plaintiffs move for an order pursuant to CPLR 602 consolidating all of the above pending cases in Su-

preme Court, and removing and consolidating those cases pending in County Court, Ulster County, upon the ground that all involved common questions of fact and law. Said relief shall be granted. The proof before this court is sufficient to establish that the jurisdictional allegations of the various actions are amenable to uniform disposition, and require a similar result as has been reached in the instant decision.

All papers to attorneys for plaintiffs, who shall submit an order, on notice, in conformance herewith.

Dated: February 4, 1983
Albany, New York

STATE OF NEW YORK SUPREME COURT
COUNTY OF ULSTER

At a Special Term of the Supreme Court of the State of New York, Albany County, Held At the Albany County Supreme Court Court House on the 29th day of July, 1982.

PRESENT: Hon. LAWRENCE E. KAHN, *J.S.C.*

83-706

NELLY RIOS, individually and as the legal representative of her son, JUAN VALDERRAMA RIOS; PABLO CEPEDA QUINONES, JUAN NUNEZ QUINO, ROBERT SANTIAGO GOMEZ, FEDERICO ALBERT COLON, FELIX DAVILA FUENTES, RICARDO NAVARRO RIVERA, SILVA ESTHER RESTO JAIME, individually and as legal representative of her son, ANGEL LUIS GRACIA RESTO; DANIEL FIGUEROA RAMOS, individually and on behalf of his son, JOSE DANIEL FIGUEROA SANDOVAL; MONSERRATE RIVERA, individually and as legal representative of his son, EDWIN AMEZQUITA RIVERA; JUSTO M. VELEZ, individually and as GILBERTO MEDINA MIRANDA; JESUSA VASQUEZ, individually and as legal representative of her son, ARMANDO ROBLES VASQUEZ,

Plaintiffs,

—against—

ALTAMONT FARMS, INC.,

Defendant.

RAMON LUIS ESCABI DELGADO, by his father RAMON LUIS ESCABI ORTIZ; EMILIO SANTOS RIVERA, LUIS TORRES LOPEZ, RAFAEL HERNAIZ RAMOS, DAVID CASADO SANCHEZ, ORLANDO RIVERA PAZ, by his mother NILSA PAZ DE RIVERA; HECTOR MANUEL RODRIGUEZ; JULIO JIMENEZ ROMERO by his mother DONATO ROMERO,
Plaintiffs,

—against—

ALTAMONT FARMS, INC.,
Defendant.

CELESTINO AMARO, individually and on behalf of his son DOMINGO AMARO FIGUEROA, a minor,
Plaintiffs,

—against—

ERNEST GREINER,
Defendant.

CATALINA MALAVE,
Plaintiff,

—against—

OVERLOOK FARMS, INC.,
Defendant.

RAUL DELGADO MONTES,
Plaintiff,

—against—

MINARD FARMS, INC.,
Defendant.

ESTEBAN ACOSTA ROSA, MARTIN BRACETTY BAEZ, JORGE CUADRA ROSADO, RAFAEL MELENDEZ OTERO, LUIS A. MOYET, JOSE ROSA RIOS and JUSTO SANCHEZ MARTINEZ,
Plaintiffs,

—against—

A. J. DEMBROSKI,
Defendant.

JESUS CARRASQUILLO DELGADO,
Plaintiff,

—against—

A. J. DEMBROSKI,
Defendant.

ALEJO MORALES TORRES,
Plaintiff,

—against—

ROBERT COY,
Defendant.

ANGEL MEDINA RAMOS,
Plaintiff,

—against—

J. W. CLARK & SONS,
Defendant.

ORDER

Plaintiffs in the above-captioned actions, by their attorneys, Farmworker Legal Services of New York, Inc., HOWARD SCHELL REILLY, of counsel, having moved

this Court for an order pursuant to Rule 602 of the Civil Practice Law and Rules consolidating *Nelly Rios, et al. v. Altamont Farms, Inc.* and *Esteban Acosta Rosa, et al.*, actions pending in the Supreme Court, Ulster County, and removing and consolidating *Ramon Luis Escabi Delgado, et al. v. Altamont Farms, Inc., Celestino Amaro, etc. v. Ernest Greiner, Catalina Malave v. Overlook Farms, Inc., Raul Delgado Montes v. Minard Farms, Inc., Jesus Carrasquillo Delgado v. A. J. Dembroski, Alejo Morales Torres v. Robert Coy,* and *Angel Medina Ramos v. J. W. Clark & Sons,* actions pending in the County Court, Ulster County on the grounds that each of these actions has common issues of law and fact, and having moved for an order pursuant to Rule 3212 of the Civil Practice Law and Rules granting plaintiffs summary judgment herein upon the grounds that there are no triable issues of fact and that there is no merit to the defenses asserted in the answers of the defendants herein, and said motion having regularly come on to be heard.

NOW, upon reading and filing the notices of motion dated the 23rd day of June, and the 15th day of July, 1982, the affidavits of HOWARD SCHELL REILLY, duly sworn to the 23rd day of June and the 15th day of July, 1982 together with the exhibits annexed thereto, and accompanying briefs, and the summonses, complaints, answers, all with proof of service in support of said motions, and the affidavit of WILLIAM PALADINO, JR., duly sworn to the 21st day of May, 1982 and of THOMAS J. BACAS, duly sworn to the 28th day of July, 1982, in opposition thereto, together with the exhibits annexed thereto, and accompanying briefs, and after hearing Farmworker Legal Services of New York, Inc., (HOWARD SCHELL REILLY, ESQ.) attorneys for plaintiffs, in support thereof, and Rusk, Rusk, Plunket & Wadlin (JOHN RUSK, JR., ESQ.) and Charles, Karalekas, Bacas, and McCahill (S. STEPHEN KARALEKAS, ESQ.), in opposition thereto and due deliberation having been had, and the Court having rendered its de-

cision, in writing, dated February 4, 1983, a copy of which is annexed hereto,

NOW, on the motion of Farmworker Legal Services of New York, Inc., HOWARD SCHELL REILLY, of counsel, it is

ORDERED that plaintiffs' motion for consolidation of *Nelly Rios, et al. v. Altamont Farms, Inc.* and *Esteban Acosta Rosa, et al.*, and for removal and consolidation of *Ramon Luis Escabi Delgado, et al. v. Altamont Farms, Inc., Celestino Amaro, etc. v. Ernest Greiner, Catalina Malave v. Overlook Farms, Inc., Raul Delgado Montes v. Minard Farms, Inc., Jesus Carrasquillo Delgado v. A. J. Dembroski, Alejo Morales Torres v. Robert Coy, and Angel Medina Ramos v. J. W. Clark & Sons,* be and the same hereby is, in all respects, granted, and it is further

ORDERED that plaintiffs' motion for summary judgment in their favor and against defendants be, and the same hereby is, in all respects granted for the relief demanded in the complaints, and it is further

ORDERED that judgment in the consolidated cases be entered herein by the Clerk of the Court, in favor of plaintiffs and against the defendants as demanded in the complaints, together with costs and disbursements to be taxed.

Dated: Albany, New York
February , 1983

ENTER:

_____

J.S.C.

APPENDIX D

COMMONWEALTH OF VIRGINIA

[SEAL]

TWENTY-SIXTH JUDICIAL CIRCUIT

September 13, 1984
(Dictated September 11, 1984)

Steven D. Rosenfield, Esquire
Wyatt & Rosenfield
917 East Jefferson Street
Charlottesville, Virginia 22901

William A. Johnston, Esquire
Harrison & Johnston
Post Office Box 809
Winchester, Virginia 22601

Re: Fernandos Varges Soto, et al
v. Orchard Management Company, et al — Circuit Court of Frederick County — Law Nos. 4027-4056

Gentlemen:

Based on the pleadings and stipulation of facts in these consolidated cases I have decided to sustain defendants' motion for summary judgment. Plaintiffs filed brief in support of their motion for summary judgment but I do not find that one was filed. If this were an oversight, to make the record complete leave is granted to plaintiffs to file such a motion *nunc pro tunc.*

I wish to congratulate counsel for the excellence of the briefs filed, which were of great assistance to the Court. Considering this and other circumstances it is still my

intention, hopefully in the near future, to write an opinion setting forth the reasons for my ruling.

Yours very truly,

/s/ Robert K. Woltz
ROBERT K. WOLTZ
Judge

h

Original to Court File

APPENDIX E

DISTRICT COURT OF MARYLAND
FOR WASHINGTON COUNTY

No. 83-3101

HUMBERTO GREGORY-AYALA

v.

RINEHART ORCHARDS, INC.

SUMMARY JUDGMENT FOR DEFENDANT
GRANTED MARCH 30, 1984

JUDGE JAMES STRINE *

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* The docket entries for the District Court of Maryland are not reproduced herein as the court's docket sheets cannot be reproduced in 11 point type.

DISTRICT COURT OF MARYLAND
FOR WASHINGTON COUNTY

No. 83-3102

JULIO RODRIQUEZ, *et al.*

v.

HEPBURN ORCHARDS, INC.

SUMMARY JUDGMENT FOR DEFENDANT
GRANTED MARCH 30, 1984

JUDGE JAMES STRINE *

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* The docket entries for the District Court of Maryland are not reproduced herein as the court's docket sheets cannot be reproduced in 11 point type.

APPENDIX F

STATUTORY PROVISIONS

Rules of Civil Procedure, the Commonwealth of Puerto Rico, 32 L.P.R.A. App. II, Rule 4.7(a):

4.7. Substitute service

(a) Where the person to be served is not within Puerto Rico, the General Court of Justice of Puerto Rico shall have personal jurisdiction over said nonresident as if he were a resident of the Commonwealth of Puerto Rico, if the action or claim arises as a result of the following:

(1) Such person or his agent carries out business transactions within Puerto Rico; or

(2) Executes by himself or through his agent, tortious acts within Puerto Rico; or

(3) Meets with an accident while by himself or through his agent driving a motor vehicle in Puerto Rico; or

(4) Meets with an accident in Puerto Rico in the operation, by himself or through his agent, of a freight or passenger-transportation business in Puerto Rico or between Puerto Rico and the United States or between Puerto Rico and a foreign country, or the accident occurs outside of Puerto Rico in the operation of such business, when the contract has been executed in Puerto Rico; [or]

(5) Is the owner, or by himself, or through his agent, uses or owns real property located in Puerto Rico.

The Wagner-Peyser Act of 1933, 29 U.S.C. § 49:

§ 49. United States Employment Service; establishment in Department of Labor; statement of purpose

In order to promote the establishment and maintenance of a national system of public employment offices, the United States Employment Service shall be established and maintained within the Department of Labor.

The Wagner-Peyser Act of 1933, 29 U.S.C. § 49b(a):

§ 49b. Duties of Service and Secretary

(a) Scope of assistance by Service, standards of efficiency; problems of localities; uniformity of administrative and statistical procedures; information; employment opportunities and operation of system; interstate labor clearing system

The United States Employment Service shall assist in coordinating the State public employment services throughout the country and in increasing their usefulness by developing and prescribing minimum standards of efficiency, assisting them in meeting problems peculiar to their localities, promoting uniformity in their administrative and statistical procedure, furnishing and publishing information as to opportunities for employment and other information of value in the operation of the system, and maintaining a system for clearing labor between the States.

Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 (a)(15)(H):

(a) As used in this chapter—

* * * *

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * * *

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability, and who, in the case of a graduate of a medical school coming to the United States to perform services as a member of the medical profession, is coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency in the United States to teach or conduct research, or both, at or for such institution or agency; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession; or (iii) who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training; and the alien spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him;

Immigration and Nationality Act of 1952, 8 U.S.C. § 1184(c):

(c) The question of importing any alien as a nonimmigrant under section 1101(a)(15)(H) or (L) of this title in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant.

REGULATIONS

Immigration and Naturalization Service, 8 C.F.R. § 214.2 (h)(3):

(3) *Petition for alien to perform temporary service or labor*—(i) *Labor certification.* Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made, shall be attached to every nonimmigrant visa petition to accord an alien a classification under section 101 (a)(15)(H)(ii) of the Act. If there is attached to the petition a notice from the Secretary of Labor or his designated representative that certification cannot be made, the petitioner shall be permitted to present countervailing evidence that qualified persons in the United States are not available and that the employment policies of the Department of Labor have been observed. All such evidence submitted will be considered in the adjudication of the petition.

Subpart F—Agricultural Clearance Order Activity

§ 653.500 Purpose and scope of subpart.

This section contains the requirements for acceptance and handling of intrastate and interstate job clearance orders seeking workers to perform agricultural or food processing work on a less than year round basis. Orders seeking workers to perform agricultural or food processing work on a year round basis which involves permanent relocation are not subject to the requirements of this subpart. This section, therefore, contains requirements which affect not only applicants who are categorized as MSFWs based on their past employment, but all workers

who are recruited through the JS intrastate and interstate clearance systems for less than year round agricultural or food processing work.

§ 653.501 Requirements for accepting and processing clearance orders.

(a) In view of the statutorily established basic function of the job service as a no-fee labor exchange, that is, as a forum for bringing together employers and job seekers, neither the ETA nor the State agencies are guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers. Nor does any job order accepted or recruited upon by the JS constitute a contractual job offer to which the ETA or a State agency is in any way a party. Nevertheless, if the ETA or a State agency discovers that an employer's job order contains a material misrepresentation, the procedures of Subpart F of Part 658 of this chapter shall be followed.

(b) Intrastate and interstate job orders shall include the language of the first two sentences of paragraph (a) of this section.

(c) No local office or State agency shall place into intrastate or interstate clearance any job order seeking workers to perform agricultural or food processing work before reviewing it pursuant to paragraphs (d) or (e) of this section, as applicable.

(d) No local office shall place a job order seeking workers to perform agricultural or food processing work into intrastate clearance unless:

(1) The job order does not contain an unlawful discriminatory specification by race, color, religion, national origin, age, sex, or mental or physical status unrelated to job performance (handicap);

(2) The employer has signed the job order and the job order states all the material terms and conditions of the employment, including:

(i) The crop;

(ii) The nature of the work;

(iii) The anticipated period and hours of employment;

(iv) The anticipated starting and ending date of employment and the anticipated number of days and hours per week for which work will be available;

(v) An assurance that:

(A) The employer will provide to workers referred through the clearance system the number of hours of work cited in paragraph (d) (2) (iv) of this section for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 working days prior to the original date of need (pursuant to paragraph (d) (2) (xiii) of this section) by so notifying the order-holding office. The State agency shall make a record of this notification and shall attempt to inform referred migrant workers of the change in accordance with the following procedure:

(B) All workers referred through the clearance system, farm labor contractors on behalf of migrant workers or family heads on behalf of migrant family members referred through the clearance system shall be notified to contact a local job service office, preferably the order-holding office, to verify the date of need cited no sooner than 9 working days and no later than 5 working days prior to the original date of need cited on the job order; and that failure to do so will disqualify the referred migrant worker from the assurance provided in paragraphs (a) and (d) of this section.

(C) If the worker referred through the clearance system contacts a local office (in any State) other than the order holding office, that local office shall assist the referred worker in contacting the order holding office on a timely basis. Such assistance shall include, if necessary, contacting the order holding office by telephone or other timely means on behalf of the worker referred through the clearance system.

(D) If the employer fails to notify the order-holding office at least 10 working days prior to the original date of need the employer shall pay eligible (pursuant to paragraph (b) of this section) workers referred through the clearance system the specified hourly rate of pay, or in the absence of a specified hourly rate of pay, the higher of the Federal or State minimum wage for the first week starting with the originally anticipated date of need.

(E) Employers may require workers to perform alternative work if the guarantee in this section is invoked and if such alternative work is stated on the job order.

(F) For the purposes of this assurance, "working days" shall mean those days that the order-holding local office is open for public business.

(vi) The hourly wage rate or the piece rate estimated in hourly wage rate equivalents for each activity and unit size;

(vii) Any deductions to be made from wages;

(vii) A specification of any non-monetary benefits to be provided by the employer;

(ix) Any hours, days or weeks for which work is guaranteed, and, for each guaranteed week of work except as provided in paragraph (d) (2) (v) of this section, the exclusive manner in which the guarantee may be abated due to weather conditions or other acts of God beyond the employer's control;

(x) Any bonus or work incentive payments or other expenses which will be paid by the employer in addition to the basic wage rate, including the anticipated time period(s) within which such payments will be made. No such payments, however, shall be made contingent upon the worker continuing employment beyond the period of employment specified in the job order or, in the case of any worker with children, beyond the time needed to return home for the beginning of the school year;

(xi) An assurance that no extension of employment beyond the period of employment specified in the job order shall relieve the employer from paying the wages already earned, or if specified in the job order as a term of employment, providing transportation or paying transportation expenses to the worker's home;

(xii) Assurances that the working conditions comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration and other employment-related laws;

(xiii) An assurance that the employer will expeditiously notify the order-holding local office or State agency by telephone immediately upon learning that a crop is maturing earlier or later, or that weather conditions, over-recruitment or other factors have changed the terms and conditions of employment. For orders submitted in conjunction with requests for foreign workers, an assurance that the employer will follow-up the telephone notification in writing.

(xiv) An assurance that the employer, if acting as a farm labor contractor ("FLC") or farm labor contractor employee ("FLCE") on the order, has a valid FLC certificate or FLCE identification card; and

(xv) An assurance of the availability of no cost or public housing which meets the Federal standards and which is sufficient to house the specified number of workers requested through the clearance system. This assurance shall cover the availability of housing for only those workers, and, when applicable, family members who are unable to return to their residence in the same day.

(xvi) An assurance that outreach workers shall have reasonable access to the workers in the conduct of outreach activities pursuant to § 653.107.

(3) The job order contains all the material terms and conditions of the job, and the employer assures that all items therein are actual conditions of the job by signing the following statement: "This job order describes the

actual terms and conditions of the employment being offered by me and contains all the material terms and conditions of the job";

(4) The wages and working conditions offered are not less than the prevailing wages and working conditions among similarly employed agricultural workers in the area of intended employment or the applicable Federal or State minimum wage, whichever is higher. If the wages offered are expressed as piece rates or as base rates and bonuses, the employer shall make the method of calculating the wage and supporting materials available to JS staff who shall check if the employer's calculation of the estimated hourly wage rate is reasonably accurate and is not less than the prevailing wage rate or applicable Federal or State minimum wage, whichever is higher;

(5) The employer has agreed to provide or pay for the transportation of the workers and their families on at least the same terms as transportation is commonly provided by employers in the area of intended employment to agricultural workers and their families recruited from the same area of supply;

(6) JS staff have determined, through a preoccupancy housing inspection performed by JS staff or other appropriate public agencies, that the housing assured by the employer is in fact available, and meets the full set of standards set forth at 20 CFR Part 654, Subpart E which details applicable housing standards and contains provisions for conditional access to the clearance system; except that mobile range housing for sheepherders shall meet existing Departmental guidelines; and

(7) The local office and employer have attempted and have not been able to obtain sufficient workers within the local labor market area, or the local office anticipates a shortage of local workers.

(e) No state agency shall place a job order seeking workers to perform agricultural or food processing work with interstate clearance unless:

(1) The job order meets the requirements set forth at paragraphs (d)(1) through (d)(6) of this section;

(2) The State agency and the employer have attempted and have not been able to locate sufficient workers within the state, or the State agency anticipates a shortage of workers within the State; and

(3) The order has been reviewed and approved by the ETA regional office within 10 working days after receipt from the State agency, and the Regional Administrator has approved the areas of supply to which the order shall be extended. Any denial by the Regional Administrator shall be in writing and set forth the reasons for the denial.

(f)(1) The local office shall use the agricultural clearance form prescribed by ETA, and shall see that all necessary items on the form are completed, including items on attachments to the form prescribed by ETA.

(2)(i) The original of an interstate agricultural clearance form shall be retained for the order-holding local office files. If the clearance order is submitted in conjunction with a request for certification of temporary alien agricultural workers, the procedures at 20 CFR 655.204(a) shall be followed. For other clearance orders, the order-holding local office shall transmit a complete copy to the State office. The State office shall distribute additional copies of the form with all attachments except that the State agency may, at its discretion, delegate this distribution to the local office, as follows:

(A) At least one clear copy to each of the State agencies selected for recruitment (areas of supply);

(B) One copy to each applicant-holding ETA regional office;

(C) One copy to the order-holding ETA regional office; and

(D) One copy to the Regional Farm Labor Coordinated Enforcement Committee in the area of employment, Attn: ESA Regional Administrator.

(ii) Applicant-holding offices shall provide workers referred on clearance orders with a checklist summarizing wages, working conditions and other material specifications on the job order. Such checklists, where necessary, shall be in English and Spanish. The checklist shall include language notifying the worker that a copy of the complete order is available for inspection. One copy of the form with all attachments shall be available for inspection in the applicant-holding office and the order-holding office. State agencies shall use a standard checklist format provided by ETA unless a variance has been approved by the Regional Administrator.

(iii) The applicant-holding office shall give each referred worker a copy of a description of worker's rights developed by the National Farm Labor Coordinated Enforcement Committee.

(g) The local office may place an intrastate or interstate order seeking workers to perform agricultural or food processing work for a specific farm labor contractor or worker preferred by the employer provided the order meets JS nondiscrimination criteria. The order would not meet such criteria, for example, if it requested a "white male crew leader" or "any white male crew leader."

(h) In local offices which have been designated significant MSFW bilingual offices by ETA, and in any other local office with bilingual staff, bilingual (English-Spanish) staff shall assist all agricultural workers, upon request, to understand the terms and conditions of employment set forth in intrastate and interstate job orders and shall provide such workers with checklists in Spanish showing wage payment schedules, working conditions and other material specifications of the job order.

(i) No agricultural or food processing order shall be included in job bank listings available outside the local office commuting area unless the order has been processed

according to requirements for intrastate or interstate clearance contained in this subpart. If the job bank for the local office area incorporates offices beyond the local office commuting area, the order may be included in the listing but must be clearly designated as prohibiting referral from outside the community area, unless the requirements of this subpart are met.

(j) If the labor supply State agency accepts a clearance order, the State agency shall actively recruit workers for referral. In the event a potential labor supply State agency rejects a clearance order, the reasons for rejection shall be documented and submitted to the Regional Administrator having jurisdiction over the State agency. The Regional Administrator will examine the reasons for rejection, and, if the Regional Administrator agrees, will inform the Regional Administrator with jurisdiction over the order-holding State agency of the rejection and the justifiable reasons. If the Regional Administrator who receives the notification of rejection does not concur with the reasons for rejection, that Regional Administrator will so inform the USES Administrator, who will make a final determination on the acceptance or rejection of the order.

Temporary Labor Certification Process Regulations, 20 C.F.R. Part 655 (1984):*

§ 655.0 Scope and purpose of Part.

(a) *General.* This part sets out the procedures adopted by the Secretary to secure information sufficient to make factual determinations of: (1) whether U.S. workers are available to perform temporary employment in the United States, for which an employer desires to employ nonimmigrant foreign workers, and (2) whether the employment of aliens for such temporary work will ad-

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* Bracketed sections indicate text of 1978 regulation.

versely affect the wages or working conditions of similarly employed U.S. workers. These factual determinations (or a determination that there are not sufficient facts to make one or both of these determinations) are required by the Attorney General, acting through the Immigration and Naturalization Service (INS) of the Department of Justice, to assist the Attorney General to carry out the policy of the Immigration and Nationality Act (INA), as implemented in the INS regulation at 8 CFR 214.2(h)(3)(i), that a nonimmigrant alien worker not be admitted to fill a particular temporary job opportunity unless no qualified U.S. worker is available to fill the job opportunity, and unless the employment of the foreign worker in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. worker.

Subpart C—Labor Certification Process for Temporary Agricultural and Logging Employment

§ 655.200 General Description of this subpart and definition of terms.

(a) An employer who desires to use foreign workers for temporary employment must file a temporary labor certification application including a job offer for U.S. workers with a local office of a State employment service agency. The employer should file an application a minimum of 80 days before the estimated date of need for the workers. If filed 80 days before need, sufficient time is allowed for the 60-day recruitment period required by the regulations and a determination by the Regional Administrator (RA) as to the availability of U.S. workers 20 days before the date of need. Shortly after the application has been filed, the RA makes a determination as to whether or not the application has been filed in enough time to recruit U.S. workers and whether or not the job offer for U.S. workers offers wages and working conditions which will not adversely affect the wages and work-

ing conditions of similarly employed U.S. workers, as prescribed in the regulations in this subpart. If the application does not meet the regulatory wage and working conditions standards, the RA shall deny the temporary labor certification application and offer the employer an administrative judicial review of the denial by a Department of Labor Hearing Officer. If the application is not timely, the RA has discretion, as set forth in these regulations, to either deny the application or permit the process to proceed reasonably with the employer recruiting U.S. workers upon such terms as will accomplish the purposes of the INA and the INS regulations. Where the application is timely and meets the regulatory standards, the State employment service agency, the employer, and the Department of Labor recruit U.S. workers for 60 days. At the end of the 60 days, the RA grants the temporary labor certification if the RA finds that (1) the employer has not offered foreign workers higher wages or better working conditions (or less restrictions) than that offered to U.S. workers, and (2) U.S. workers are not available for the employer's job opportunities. If the temporary labor certification is denied, the employer may seek an administrative-judicial review of the denial by a Department of Labor Hearing Officer as provided in these regulations. The Department of Labor thereafter advises the Immigration and Naturalization Service (INS) of approvals and denials of temporary labor certifications. The INS may accept or reject this advice. 8 C.F.R. 214(h)(3). The INS makes the final decision as to whether or not to grant visas to the foreign workers.

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§ 655.201 Temporary labor certification applications.

(a)(1) An employer who anticipates a labor shortage of workers for agricultural or logging employment may request a temporary labor certification for temporary foreign workers by filing, or by having an agent file, in

duplicate, a temporary labor certification application, signed by the employer, with a local office in the area of intended employment.

* * * *

(b) Every temporary labor certification application shall include:

(1) A copy of the job offer which will be used by the employer (or each employer) for the recruitment of both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of § 655.202 and § 658.108 of this chapter;

(2) The assurances required by § 655.203; and

(3) The specific estimated date of need of workers.

(c) The entire temporary labor certification application shall be filed with the local office in duplicate and in sufficient time to allow the State agency to attempt to recruit U.S. workers locally and through the Employment Service intrastate and interstate clearance system for 60 calendar days prior to the estimated date of need. Section 655.206 requires the RA to grant or deny the temporary labor certification application by the end of the 60 calendar days, or 20 days from the estimated date of need, whichever is later.

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§ 655.202 Contents of job offers.

(a) So that the employment of aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers, each employer's job offer to U.S. workers must offer U.S. workers at least the same benefits which the employer is offering, intends to offer, or will afford, to temporary foreign workers. Conversely, no job offer may impose on U.S. workers any

restrictions or obligations which will not be imposed on the employer's foreign workers. For example, if the employer intends to advance transportation costs to foreign workers either directly or indirectly (by having them paid by the foreign government involved), the employer must offer to advance the transportation costs of U.S. workers.

(b) Except when higher benefits, wages or working conditions are required by the provisions of paragraph (a) of this section, the Administrator has determined that, in order to protect similarly employed U.S. workers from adverse effect with respect to wages and working conditions, every job offer for U.S. workers must always include the following minimal benefit, wage, and working condition provisions:

(1) The employer will provide the worker with housing without charge to the worker. The housing will meet the full set of [Department of Labor, Occupational Safety and Health Administration] standards set forth at 29 CFR 1910.142 [or the full set of standards of 20 CFR Part 620, if applicable. See the FEDERAL REGISTER of December 9, 1977, for applicability criteria),] except that for mobile range housing for sheepherders shall meet [guidelines which shall be issued periodically by the Department.] When it is the prevailing practice in the area of intended employment to provide family housing, the employer will provide such housing to such workers.

(2) (i) If the job opportunity is covered by the State workers' compensation law, the worker will be eligible for workers' compensation for injury and disease arising out of and in the course of worker's employment; or

(ii) If the job opportunity is not covered by the State workers' compensation law, the employer will provide at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment which will provide benefits at least equal to

those provided under the State workers' compensation law for comparable employment;

(3) The employer will provide without cost to the worker all tools, supplies and equipment required to perform the duties assigned and, if any of these items are provided by the worker, the employer will reimburse the worker for the cost of those so provided;

[(4) The employer will provide the worker with three meals a day. The job offer shall state the cost to the worker for such meals. The cost shall not be more than $3.25 per day unless the RA has approved a higher cost pursuant to § 655.211.]*

(5) (i) The employer will provide or pay for the worker's transportation and daily subsistence from the place, from which the worker, without intervening employment, will come to work for the employer, to the place of employment, subject to the deductions allowed by paragraph (b) (13) of this section. The amount of the daily subsistence payment shall be at least as much as the amount the employer will charge the worker with three meals a day during employment;

(ii) If the worker completes the work contract period, the employer will provide or pay for the worker's transportation and daily subsistence from the place of employment to the place, from which the worker, without intervening employment, came to work for the employer, unless the worker has contracted for employment with a subsequent employer who, in that contract, has agreed to

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* The 1984 version of this section of the regulations reads:

(4) The employer will provide the worker with three meals a day, except that where under prevailing practice or long-standing arrangement at the establishment workers prepare their meals, employers need furnish only: free and convenient cooking and kitchen facilities. When the employer provides meals, the job offer shall state the cost to the worker for such meals. The cost shall not be more than $4.00 per day unless the RA has approved a higher cost pursuant to § 655.211 of this part;

pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite; and

(iii) The employer will provide transportation between the worker's living quarters and the employer's worksite without cost to the worker, and such transportation will be in accordance with applicable laws and regulations;

(6) (i) The employer guarantees to offer the worker employment for at least three-fourths of the workdays of the total period during which the work contract and all extensions thereof are in effect, beginning with the first workday after the arrival of the worker at the place of employment and ending on the termination date specified in the work contract, or in its extensions if any. For purposes of this paragraph, a workday shall mean any period consisting of 8 hours of work time. An employer shall not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays. The work must be offered for at least three-fourths of the 8 hour workdays. (That is, ¾ x (number of days x 8 hours.)) Therefore, if, for example, the contract contains 20 workdays, the worker must be offered employment for 120 hours during the 20 workdays. A worker may be offered more than 8 hours of work on a single workday. For purposes of meeting the guarantee, however, the worker may not be required to work for more than 8 hours per weekday, or on the worker's Sabbath or Federal holidays;

(ii) If the worker will be paid on a piece rate basis, the employer will use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iii) Any hours which the worker fails to work when the worker has been offered an opportunity to do so pursuant to paragraph (b) (6) (i) of this section, and all hours of work actually performed (including voluntary

work over 8 hours in a workday, or on the worker's Sabbath or Federal holidays) may be counted by the employer in calculating whether the period of guaranteed employment has been met;

(7) (i) The employer will keep accurate and adequate records with respect to the workers' earnings, including field tally records, supporting summary payroll records, and records showing: The nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with, and over and above, the guarantee); the hours actually worked each day by the worker; this time the worker began and ended each workday; the rate of pay; the workers' earnings per pay period; and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered in accordance with the guarantee, the records will state the reason or reasons therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by representatives of the Secretary of Labor, and by the worker and the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(8) The employer will furnish to the worker at or before each payday, in one or more written statements;

(i) The worker's total earnings for the pay period;

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker (broken out by offers in accordance with, and over and above, the guarantee);

(iv) The hours actually worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily;

(9) (i) If the worker will be paid by the hour, the employer will pay the worker at least the adverse effect rate; or

(ii) If the worker will be paid on a piece rate basis, the piece rate will be designed to produce average hourly earnings at least equal to the adverse effect rate. If the price rate does not result at the end of the pay period in average hourly earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the adverse effect rate, the worker's pay will be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had been paid at the adverse effect rate;

(10) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least biweekly whichever is more frequent);

(11) If the worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of any worker for whom the employer would have otherwise been required to pay such expenses under paragraph (b) (5) (ii) of this section;

(12) If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire or other Act of God which makes the fulfillment of the contract impossible, and the RA so certifies, the employer may terminate the work contract. In such

cases the employer will make efforts to transfer the worker to other comparable employment acceptable to the worker. If such transfer is not effected, the worker (i) will be returned to the place from which the worker, without intervening employment, came to work for the employer at the employer's expense; and

(ii) Will be reimbursed the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment borne directly or indirectly by the employer;

(13) The employer will make those deductions from the worker's paycheck which are required by law. The job offers shall specify all deductions, not required by law, which the employer will make from the worker's paycheck. All deductions shall be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer; in such cases, however, the job offer shall state that the worker will be reimbursed the full amount of such deductions upon the worker's completion of 50 percent of the worker's contract period; and

(14) The employer will provide the worker a copy of the work contract between the employer and the worker. The work contract shall contain all of the provisions required by paragraphs (a) and (b) of this section.

§ 655.203 Assurances.

As part of the temporary labor certification application, the employer shall include assurances, signed by the employer, that:

(a) The job opportunity is not:

(1) Vacant because the former occupant is on strike or being locked out in the course of a labor dispute; or

(2) At issue in a labor dispute involving a work stoppage;

(b) During the period for which the temporary labor certification is granted, the employer will comply with applicable Federal, State and local employment-related laws, including employment related health and safety laws;

(c) The job opportunity is open to all qualified U.S. workers without regard to race, color, national origin, sex, or religion, and is open to U.S. workers with handicaps who are qualified to perform the work. No U.S. worker will be rejected for employment for other than a lawful job related reason;

(d) The employer will cooperate with the employment service system in the active recruitment of U.S. workers until the foreign workers have departed for the employer's place of employment by;

(1) Allowing the employment service system to prepare local, intrastate and interstate job orders using the information supplied on the employer's job offer;

(2) Placing at least two advertisements for the job opportunities in local newspapers of general circulation.

(i) Each such advertisement shall describe the nature and anticipated duration of the job opportunity; offer at least the adverse effect wage rate; give the ¾ guarantee; state that work tools, supplies and equipment will be provided by the employer; state that housing will also be provided, and that transportation and subsistence expenses to the worksite will be provided or paid for by the employer;

(ii) Each advertisement shall direct interested workers to apply for the job opportunity at a local employment service office in their area;

(3) Cooperating with the employment service system in contacting farm labor contractors, migrant workers and other potential workers in other areas of the State and/or Nation by letter and/or telephone;

(4) Cooperating with the employment service system in contacting schools, business and labor organizations, fraternal and veterans organizations, and non-profit organizations and public agencies such as sponsors of programs under the Comprehensive Employment and Training Act, throughout the area of intended employment, in order to enlist them in helping to find U.S. workers; and

(5) If the employer, or an association of employers of which the employer is a member, intends to negotiate and/or contract with the Government of a foreign nation or any foreign association, corporation or organization in order to secure foreign workers, making the same kind and degree of efforts to secure U.S. workers;

(e) From the time the foreign workers depart for the employer's place of employment, the employer will provide employment to any qualified U.S. worker who applies to the employer until fifty percent of the period of the work contract, under which the foreign worker who is in the job was hired, has elapsed. In addition, the employer will offer to provide housing, and the other benefits, wages, and working conditions required by § 655.202, to any such U.S. worker; and

(f) Performing the other specific recruitment activities specified in the notice from the RA required by § 655.205(a).

§ 655.204 Determinations based on temporary labor certification applications.

(a) Within two working days after the temporary labor certification application has been filed with it, the local office shall mail the duplicate application directly to the appropriate RA.

(b) The local office, using the job offer portion of its copy of the temporary labor certification application, shall promptly prepare a local job order and shall begin to recruit U.S. workers in the area of intended employment.

(c) The RA, upon receipt of the duplicate temporary labor certification application, shall promptly review the application to determine whether it meets the requirements of §§ 655.201-655.203 in order to determine whether the employer's application is (1) timely, and (2) contains offers of wages, benefits, and working conditions required to ensure that similarly employed U.S. workers will not be adversely affected. If the RA determines that the temporary labor certification application is not timely in accordance with § 655.201 of this subpart, the RA may promptly deny the temporary labor certification on the grounds that, in accordance with that regulation, there is not sufficient time to adequately test the availability of U.S. workers. If the RA determines that the application does not meet the requirements of §§ 655.202-655.203 because the wages, working conditions, benefits, assurances, job offer, etc. are not as required, the RA shall deny the certification on the grounds that the availability of U.S. workers cannot be adequately tested because the wages or benefits, etc. do not meet the adverse effect criteria.

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§ 655.205 Recruitment period.

(a) If the RA determines that the temporary labor certification application meets the requirements of §§ 655.201-655.203, the RA shall promptly notify the employer in writing, with copies to the State agency and local office. The notice shall inform the employer and the State agency of the specific efforts which will be expected from them during the following weeks to carry out the assurances contained in § 655.203 with respect to the recruitment of U.S. workers. The notice shall require that the job order be placed both into intrastate clearance and into interstate clearance to such States as the RA shall determine to be potential sources of U.S. workers.

(b) Thereafter, the RA, under the direction of the ETA national office and with the assistance of other RAs with respect to areas outside the region, shall pro-

vide overall direction to the employer and the State agency with respect to the recruitment of U.S. workers.

(c) By the 60th day of the recruitment period, or 30 days before the date of need specified in the application, whichever is later, the RA, when making a determination of the availability of U.S. workers, shall also make a determination as to whether the employer has satisfied the recruitment assurances in § 655.203. If the RA concludes that the employer has not satisfied the requirement for recruitment of U.S. workers, the RA shall deny the temporary labor certification, and shall immediately notify the employer in writing with a copy to the State agency and local office. The notice shall contain the statements specified in § 655.212 shall be followed.

(d) If the employer timely requests an expedited administrative-judicial review before a DOL Hearing Officer, the procedures in § 655.212 shall be followed.

§ 655.206 Determinations of U.S. worker availability and adverse effect on U.S. workers.

(a) If the RA, in accordance with § 655.205 has determined that the employer has complied with the recruitment assurances, the RA, by 60th day of the recruitment period, or 20 days before the date of need specified in the application, whichever is later, shall grant the temporary labor certification for enough aliens to fill the employer's job opportunities for which U.S. workers are not available. In making this determination the RA shall consider as available for a job opportunity any U.S. worker who has made a firm commitment to work for the employer, including those workers committed by other authorized persons such as farm labor contractors and family heads; such a firm commitment shall be considered to have been made not only by workers who have signed work contracts with the employer, but also by those whom the RA determines are very likely to sign such a work contract. The RA shall also count as available any

U.S. worker who has applied to the employer (or on whose behalf an application has been made), but who was rejected by the employer for other than lawful job-related reasons unless the RA determines that:

(1) Enough qualified U.S. workers have been found to fill all the employer's job opportunities; or

(2) The employer, since the time of the initial determination under § 655.204, has adversely affected U.S. workers by offering to, or agreeing to provide to, alien workers better wages, working conditions, or benefits (or by offering or agreeing to impose on alien workers less obligations and restrictions) than that offered to U.S. workers.

(b) (1) Temporary labor certifications shall be considered subject to the conditions and assurances made during the application process. Temporary labor certifications shall be for a limited duration such as for "the 1978 apple harvest season" or "until November 1, 1978", and they shall never be for more than eleven months. They shall be limited to the employer's specific job opportunities; therefore, they may not be transferred from one employer to another.

(2) If an association of employers is itself the employer, as defined in § 655.200, certifications shall be made to the association and may be used for any of the job opportunities of its employer members and workers may be transferred among employer members.

(3) If an association of employers is a joint employer with its employer members, as defined in § 655.200, the certification shall be made jointly to the association and the employer members. In such cases workers may be transferred among the employer members provided the employer members and the association agree in writing to be jointly and severally liable for compliance with the temporary labor certification obligations set forth in this subpart.

(c) If the RA denies the temporary labor certification in whole or part, the RA shall notify the employer in writing, and by telegram. The notice shall contain all of the statements required in § 655.204(d). If a timely request is made for an administrative-judicial review by a DOL Hearing Officer, the procedures of § 655.212 shall be followed.

(d) (1) After a temporary labor certification has been granted, the employer shall continue its efforts to actively recruit U.S. workers until the foreign workers have departed for the employer's place of employment. The employer, however, must keep an active job order on file until the assurance of § 655.203(e) is met.

(2) The ES system will continue to actively recruit and refer U.S. workers as long as there is an active job order on file.

CONSTITUTIONAL PROVISIONS

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.